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ABSTRACT

This report, addressed to administrators and board members, discusses teacher dismissals in light of such motivating factors as declining enrollment, teacher supply and demand, and budget problems. Divided into nine chapters, this how-to-do-it book discusses some of the following topics: facts and figures on the dismissal of teachers, alternatives to dismissal, evaluation systems, the legal safeguards of due process, building a dismissal case, examples of 12 dismissal cases, factors influencing reduction in force (RIF), examples of four types of RIF systems, and practical advice from experts in the field. Charts and checklists are scattered throughout to aid the user in implementing a workable RIF policy. (Author/LD)

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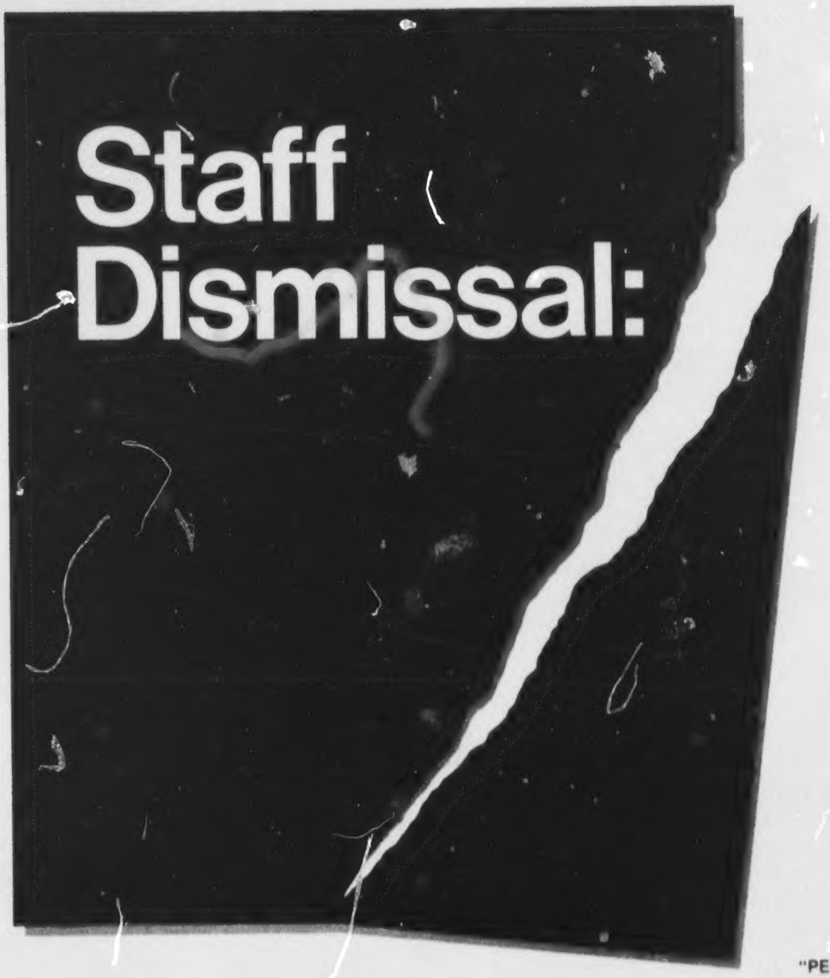
### AASA Critical Issues Report



# Staff Dismissal:

by Shirley Boes Neill
and Jerry Custis

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## The AASA Critical Issues Series

Many of the critical issues facing schools today are controversial. Some are new. None has a single best answer. Yet, administrators and boards must determine what is best for their communities. Realizing this, the American Association of School Administrators saw the need for a new series of in-depth reports to help administrators and boards. The series was initiated by AASA's Office of Information and Publications.

This is the third report in the **AASA Critical Issues Series.** Like those to follow, this report provides an in-depth analysis of the root causes and possible answers to a critical school problem. It also offers "how-to" advice, tips and guidelines, the heart of the series. Our thanks to all those who helped — school administrators, board members, attorneys, legal experts — by providing information, leads and technical advice. Special thanks to Thomas Griffin, M. Chester Nolte and George Redfern for reviewing portions of the manuscript.

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# Overview

Declining enrollments and determined, economy minded voter-taxpayers are forcing schools to do something totally foreign to their experience of recent decades: cut back their teaching staff.

Cutbacks or reductions in force (RIF) are something new to a generation of educators who prided themselves on their ability to keep up with unprecedented growth. Now, they must turn around and make the best of an entirely different situation.

Many realize, however, that even cutbacks offer opportunities: Can deadwood be weeded out? Can wasteful practices be eliminated? Can parents and taxpayers be given a better buy for their dollar? And, at the same time, can pupil achievement be maintained or even improved?

These are the challenges. In the past, however, it was much easier to dismiss teachers or talk them into moving on when the administration and the board of education decided they were not up to district standards. Now dismissals are harder because of the effective resistance of teachers unions and teachers' increased willingness to go to court if necessary to retain their jobs.

Certainly there is no question about what fewer pupils mean. Enrollment drops mean income drops. And here is what is coming: Current projections show that public school enrollment will be down 6 million students in 1983, from a 1971 high of 46.6 million.

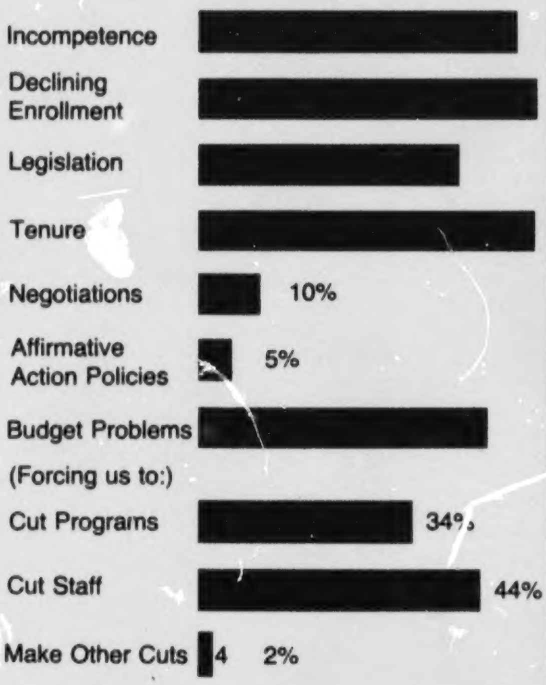
While enrollments fall, fixed costs and skyrocketing inflation are taking bigger bites out of the school budget. Unlike industry, school districts cannot pass on increased costs to the consumer and, unlike government, school districts cannot operate in the red year after year. While some of the needed cuts can be made in other parts of the budget, salaries and fringe benefits — comprising 70 to 85 percent of school budgets — cannot remain untouched.

As to inefficiency and its first cousin, incompetence, school administrators and expert observers of public education estimate that from 5 to 15 percent of currently employed teachers are performing below expected levels.

How serious are staff dismissal problems? In a survey conducted for this **Critical Issues Report,** 42 percent of 1,728 responding districts said staff dismissal and layoff issues had reached "serious" proportions.

More larger districts (over 5,000 enrollment) find staff dismissal a major problem, with 53 percent calling it "serious," compared to 40 percent of smaller districts.

One in three districts was in the process of dismissing staff in 1977 at the time the **Critical Issues** survey was conducted. Many more larger districts were making dismissals than smaller ones, by a margin of 47 percent to 29 percent. True to recent observations, dismissals were occurring more frequently in the Northeast than in other sectors of the country. Dismissals for both incompetence and reductions in force were under way in 40 percent of districts responding in the Northeast, 33 percent in the Southeast, 23 percent in the Southwest and 20 percent in the Northwest.



If Staff Dismissal Is a Serious Problem in Your District, What Is the Reason?

Source: 1977 Critical Issues Survey conducted for this report. Percentages reflect the number checking each item among districts with "serious" staff dismissal problems.

Districts were asked to rank a list of items that impact on staff dismissal decisions. Here's how they were ranked by respondents:

- Teacher tenure (often seen as preventing flexible district action).
- Declining enrollment.
- Teaching incompetence.
- Budget problems (requiring staff or program cuts).
- Legislation (seen hampering districts' efforts to manage budget and staff).
- Negotiations (resulting in restrictive provisions).
- Affirmative action policies (requiring additional considerations in hiring and making layoffs).

Not included in the survey, but mentioned by some school administrators, were personnel problems encountered by Southern schools in going from a dual to a unitary system as a result of court-ordered desegregation.

The concerns are intertwined and feed on each other. As an example, in periods of declining enrollment, districts would like to keep the "best" teachers, but they may not be the ones with the most seniority. And how can districts retain recently hired minority teachers if layoffs always follow a last in/first out rule? The teachers unions insist on strict seniority as the basis for layoffs, and many districts have agreed in negotiations to go that way because it is "safest." In other words, the district may be spared being dragged into court by the teachers union for trying to RIF teachers.

Another problem: Districts are trying to regain some of the managerial rights they lost in the first decade of collective bargaining. The unions, however, are more determined than ever to negotiate job security clauses because cuts in staff translate into lowered union membership.

The unions are not oblivious to the glut of teachers turned out by teacher preparation institutions during the early to mid 1970s. Going on the offensive, the National Education Association called for hiring more teachers to reduce student/teacher ratios and to bring schools up to what it called minimum quality standards. But it wants "new" jobs created; it doesn't want "new" teachers replacing experienced teachers with seniority.

While the unions are pressing for job security and the creation of additional jobs, the public is pressuring districts more than ever to "do a better job" and to cut costs. The minimum competency movement (to require students to meet minimum requirements before graduating from high school) under way in almost every state, has caused many citizens and taxpayer groups to question the competence and effectiveness of teachers. Some groups even have proposed that teachers themselves be required to pass tests of basic skills to retain their jobs.

A new worry for administrators and board members emerged in mid 1978: a taxpayers' revolt that may have widespread repercussions for schools. The two-to-one passage of Proposition 13, the Jarvis-Gann initiative, in the California primary election was seen as a sure omen for passage of similar initiatives, bills and constitutional amendments in other states to slash taxes and "reduce wasteful government practices."

The Jarvis-Gann initiative called for a drastic cut in property taxes in California. On the average, schools across the nation receive an average 45 percent of their budgets from local revenues, approximately one-third of which comes from property taxes. In California, one effect of Jarvis-Gann would be to reduce the share of local revenue coming from property taxes to approximately 25 percent.

In Ohio, meanwhile, voters chose to say "no" to schools in more direct fashion. They rejected nearly 69 percent of 198 school levy and bond issues on the 1978 ballot.

Even before the taxpayers' revolt surfaced, school administrators had money and staffing problems on their minds. They consistently ranked "adequate school financing," "cost reduction" and "incompetent staff" as the top three administrative problems in three polls conducted by the American Association of School Administrators in 1974, 1976 and 1977.

What do the election results indicate? Here's one interpretation by the *Wall Street Journal:* "Sentiment is suddenly crystalizing that taxes are too high and that the services government delivers are a poor bargain . . . . Americans don't want to destroy government. They want it to serve them better. They want public employees to be paid at market rates, not above the market. They want featherbedding and waste eliminated."

For schools, one likely outcome of a "successful" taxpayers' revolt will be hold-the-line or reduced budgets. The message from the public may well be: "Get rid of waste, inefficiency and unsatisfactory teachers. Give us quality at a price we can afford."

Defining the mood of the public, a Southern school superintendent said in an interview for this report: "Citizens do expect more of you these days. I think they expect you to get rid of incompetent teachers."

But listen to this opinion from Paul B. Salmon, AASA executive director: "Dismissal of staff is more difficult today than it was 10 years ago because of the dearth of jobs. Now the teacher you want to dismiss says, 'You have to fight me down to the wire because I can't get another job.' "

Not only must a district fight, hard, to dismiss a teacher on any charge but often it must fight a union representative. "The teacher's association has a large battery of attorneys who have more time than we do to work on cases," explained a Michigan superintendent. A New York administrator added: "Once tenure is in, forget dismissal in a small district." An Iowa superintendent said in his reply to the **Critical Issues** survey, "When you find out how an incompetent teacher can be dismissed, let me know."

Despite this gloom, administrators in a large number of districts are successfully solving problems of incompetence, dismissal and RIF.

The balance of this **Critical Issues Report** details the kinds of information that administrators and board members said they needed: basic facts and "how to," case studies, advice on some of the most common errors made in trying to dismiss staff and what to look out for in the future.

CHAPTER I

# Dismissals: Who, How, How Many?

One of the most difficult problems confronting school administrators and board members today is the dismissal of staff members who are not up to district standards. It plagues districts of all sizes in all parts of the country.

But administrators and board members are not alone. The public at large also is concerned about school quality and staff competence — if for no other reason than that much of the news emerging about education has a negative ring. One observer noted that a familiar slogan used at bargaining time — Schools are only as good as their teachers — is being turned around by parents and taxpayer groups with this question: Since the schools are not meeting our expectations, what does this say about our teachers?

Clearly, parents and other citizens/taxpayers are scrutinizing schools more closely. "The teaching profession is under more careful public scrutiny than other professions because it serves a large number of children and parents on a daily basis," concludes Salt Lake City Supt. M. Donald Thomas. "Teachers' salaries are paid from tax funds and therefore are subject to more intense public evaluation," he adds.

Here's another view from Prof. Theodore H. Lang of the City University of New York: "As we develop a more highly educated citizenry, the public is no longer willing to 'leave the driving to the professionals.' "

In many cases, public scrutiny has already turned into action:

- Many parents have become strong supporters of "back to basics" and "fundamental" schools for various reasons, including the guarantee that their children will concentrate on basic subjects in a disciplined environment under the tutelage of a teacher who espouses discipline and the "basics."
- Legislators in almost every state have jumped on the "minimum competency" bandwagon in an attempt to make schools (and teachers) more accountable for student learning.
- "School boards have grown tough," reports the *American School Board Journal*, "because the public is fed up with high teachers' salaries and low pupil performance."

## How Many Teachers Are Below Par?

Estimating the number of teachers who are inadequate for their jobs, unsatisfactory or otherwise not up to district standards is difficult. Many reasons account for the difficulty: varying definitions of terms such as "incompetence," a multitude of measuring and recording systems, reluctance to acknowledge the continued employment of unsatisfactory staff members. In addition, those who are below par may be "eased out," transferred or asked to resign. Many times, formal records do not indicate the below-par performance of those who are pushed out.

Results from interviews and the **Critical Issues** survey conducted for this report disclosed that:

- One-half of the districts responding to the survey (862 of 1,728 respondents) said they had dismissed staff for reasons of "incompetence" during a three-year period, through either an outright firing or the securing of a resignation after charges were filed. The number of employees dismissed, according to respondents:

1974-75 Teachers: 684
Administrators: 97
Other staff: 238

1975-76 Teachers: 766
Administrators: 107
Other staff: 273

1976-77 Teachers: 847
Administrators: 115
Other staff: 337

On the basis of this 11 percent sampling of the nation's school districts, it can be estimated that 5,000 to 10,000 teachers are dismissed annually because they are not up to or in some way do not meet district standards. That equals one-quarter to one-half of one percent of the nation's 2.1 million teachers.

- Dismissals for incompetence are higher among larger districts (5,000 students or more). Approximately 61 percent of larger districts reported having made dismissals for incompetence in the three years covered by the survey, compared with 47 percent of those with fewer than 5,000 students.
- Fifty-one percent of districts facing "serious" staff dismissal problems said they had incompetent teachers on their staffs.
- Superintendents and personnel directors estimated that from 5 to 15 percent of the teachers in their districts do not give adequate job performance. Evaluation expert George Redfern of Arlington, Va., puts the figure at 5 to 10 percent, based on his experience as a school administrator and consultant.

## How Are Teachers Terminated?

Teachers are separated from their jobs in various ways. A teacher may be terminated or nonrenewed, for example, when a board does not wish to renew his contract. A teacher may be suspended with or without pay pending a decision in a hearing for dismissal or nonrenewal. Suspensions also result when districts must reduce staff. A teacher may be dismissed or separated from his job during the life of a valid contractual period.

## Causes for Dismissal

Five states do not define cause for dismissal. Maine permits it to be set in local negotiations. In some cases, different reasons are specified for larger and smaller school districts in the same state.

Generally, however, a teacher may be dismissed for two categories of causes: incompetence and 22 other causes that are generally related to misbehavior and counterproductive conduct. Some states list only a single cause (usually "good and just cause") in their statutes on teacher contracts, while one state lists 15 specific causes.

The 23 causes specified in various state laws were pinpointed by Floyd G. Delon, professor of educational administration at the University of Missouri. (The numbers in parentheses indicate the number of states specifying that cause, based on information contained in a 1976 study by the Washington Senate Research Center. Where no figure is given, the number has been included in another similar cause.) They are:

1. Incompetence (33 states)
2. Unfitness for service (4)
3. Neglect of duty and negligence (26)
4. Failure to provide designated service
5. Failure to attend required institutions or meetings (1)
6. Inefficiency (16)
7. Incapacity (19)
8. Insubordination (22)
9. Refusal to obey regulations
10. Non-compliance with school laws (23)
11. Disloyalty (5)
12. Contract violations
13. Conviction of specified crimes (12)
14. Immorality (33)
15. Untruthfulness, dishonesty, falsification of records (4)
16. Drunkenness and intemperance (7)
17. Addiction to and selling of drugs
18. Cruelty (5)
19. Conduct unbecoming a teacher (10)
20. Unprofessional conduct
21. Violations of code of ethics
22. Revocation of teaching certificate
23. "Good," "just" or "sufficient" cause (24)

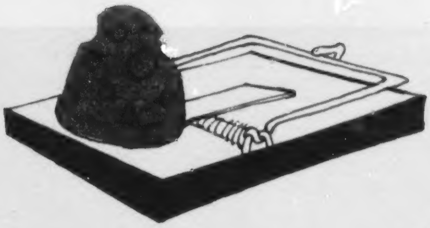
**Note:** The meaning of each of these causes varies according to the interpretation of a state's courts and administrative tribunals. Thus, states with dissimilar statutes may end up authorizing dismissal for many of the same actions or violations.

Boards of education must use *only* those causes specified in their state's statutes and may use no other. However, they may make their case for a dismissal under the elastic "good and just cause" if, in the words of school law expert Chester Nolte of Denver, "they do their homework" and their state statutes contain the elastic clause.

Generally, it is impractical for boards to consider incompetence as a cause without also considering all of the others. Why? A typical bill of charges brought against an unsatisfactory teacher contains many incidents, involving both categories of dismissal causes.

Courts themselves tend to mix the two categories of causes. As an example, the U.S. Supreme Court judged that a Philadelphia, Pa., teacher was incompetent because of his "deliberate and insubordinate" refusal to answer administrators' questions about his loyalty.

In some ways, the two categories of dismissal causes — incompetence and counterproductive conduct — are similar. Both require evidence showing some adverse effect on pupils. Proving incompetence, for example, "greatly depends upon the circumstances of the case, but generally those bringing charges should be able to reasonably relate



# Is Tenure a Trap?

The first of the state tenure laws was enacted in 1906 as an antidote to the favoritism and spoils system methods then used for selecting teachers. Since that time, tenure has been controversial. "Tenure is not a lifetime contract," one legal expert pointed out. "Neither does it protect incompetent teachers against dismissal, nor is it intended to prevent school boards from removing teachers for cause."

**Current status:**

Forty-one states and the District of Columbia have tenure laws. They usually do three things: set the requirements for obtaining permanent employment status ("tenure"), name the reasons for which a tenured teacher can be dismissed and establish the procedures for dismissal.

Four states have "continuing contract" laws. Basically, they require districts to give advance notice to teachers they plan not to rehire. Generally, districts do not have to explain their reasons for nonrenewal.

Five states provide for "annual" or "long-term contracts." Generally, districts do not have to give advance notice by a certain time when nonrenewing a teacher nor to provide other due process steps.

Clauses in a number of state tenure laws provide for exceptions and local options beyond the above summary descriptions.

Under state laws, teachers generally obtain tenure by satisfactorily serving a probationary period. Probation ranges from 60 days in one state to one to five years in others. During probation, most states permit the non-rehiring of a teacher without specifying reason. More than a dozen states, however, require districts to give written statements of cause for nonrenewal to teachers upon request. Eleven states provide for a hearing before the school board at the teacher's request, and nine permit termination of a probationary teacher only for cause.

**Controversial Area: Does the granting of tenure preclude dismissal?** Administrators believe that tenure, more than any other factor, is causing staff dismissal problems. In replying to the **Critical Issues** survey for this report, 55 percent of administrators saw tenure as the main culprit. Why? "A lot of administrators assume out of hand that they can't fire someone who has tenure," says Thomas M. Griffin, chief counsel for the California State Department of Education. But they can, say academicians, school lawyers and administrators who have dismissed tenured teachers. "Despite current myths, tenure does not protect a teacher from dismissal for reasonable cause," says Prof. Theodore H. Lang of the City University of New York. Evaluation expert George Redfern adds that "dismissal obviously is harder after tenure because teachers then have more rights."

Lawyers agree that tenure makes dismissal harder, but not impossible. Attorney Barry Bennington of St. John, Kans., says the problem is that administrators are unaccustomed to having to provide evidence to carry out a termination. But, he adds, sound cases for termination of tenured teachers can be built.

**Controversial Area: Should tenure be abolished?** Approximately one-third of the respondents to a 1976 survey by the *American School Board Journal* wanted it abolished; 31 percent favored modification; 30 percent favored local decision making on the retention or modification of tenure.

Defenders of tenure base their case on three grounds. Tenure is needed, they say, to provide the job security that attracts good teachers, to promote an employment stability that permits good programs and practices to grow, and to protect the academic freedom of teachers, thus giving students the benefit of broader, more unrestricted views and inquiry.

Another view holds that abolishing tenure would not make it easier to dismiss those deserving of dismissal and, in fact, might result in recurrence of the abuses prevalent before tenure legislation was enacted. Prof. Lang writes: "A stable, secure staff essential to a good school climate can be replaced by a timid, fearful staff, each member being primarily concerned with his personal security."

**Many alternatives to tenure have been proposed:** legislative proposals to swap the granting of collective bargaining for a repeal of tenure, to replace tenure with three- to five-year contracts, to deny tenure to those who do not already have it, and to let local school boards extend probationary periods at their option.

A spokesman for the National Education Association, on the other hand, proposed that tenure provisions be moved from state law into the text of local bargained agreements in order to provide faster resolution of contested dismissals and to give probationary teachers firmer job security.

**Conclusion: Tenure does affect dismissals, but. . .** Tenure gives real trouble only when coupled with poor evaluation, some observers feel. AASA adds in *Teacher Tenure Ain't the Problem:* "If a demonstrably poor teacher is kept on the staff simply because of his holding a tenured position, the administrator is as much or more to blame than the teacher."

"If the board is serious about its belief that tenured teachers should be dismissed," writes William R. Hazard of Northwestern University, "the tenure law opens the door wide for the charges and the supporting evidence. If the charges against teachers are difficult to prove (as many boards and administrators claim), the answer may lie in improved supervision," he concludes.

the teacher's act to the effectiveness of that teacher in the teaching-learning process," explains David S. Rosenberger and Richard A. Plimpton in the *Journal of Law and Education*. Similarly, when a teacher is accused of violating rules, "what the courts insist upon is that the rules be necessary for the accomplishment of educational goals," says Gary M. Little, general counsel for the Seattle (Wash.) Public Schools.

But the two categories differ in some ways. A dismissal for incompetence requires notice to the teacher and time to improve, while a dismissal for reasons of counterproductive conduct usually does not, according to Prof. Delon. Most incompetence cases consist of a series of examples of bad teaching, all pointing to the conclusion that the teacher should be terminated.

Cases of counterproductive conduct, however, often are based on a single serious incident. Termination for incompetence is not disciplinary in nature, Delon says, while dismissals for other reasons often are.

# What Is Incompetence?

One of the main problems in trying to deal with incompetence is simply that it's hard to define. The dictionary definition of "incompetent" is this: (1) lacking the quality needed for effective action, (2) not legally qualified or (3) inadequate to or unsuitable for a particular purpose.

Consider: Definitions 1 and 3 require subjective judgment. So far as definition 2 is concerned, once a teacher has a certificate it is considered prima facie evidence of competence.

Another problem is that "incompetence" — the label — is tossed around loosely while "incompetence" — the real legal meaning — is hard to pin down. Parents may tag a teacher as incompetent if their child does not make sufficient progress or, sometimes, if the teacher's social, moral or political standards differ from their own.

Administrators often prefer to talk about competence rather than its antithesis. Some prefer to judge competence in subjective terms: personality, compassion, a teacher's ability to establish rapport, openness, willingness to try new things, a sense of humor.

Other administrators specify that competence must be tied to specific objectives. So, too, do some academicians. They say the question to ask is: How effective is the teacher in helping the student reach agreed on educational goals?

## What Administrators Say

In interviews for this report, administrators and other school personnel who were asked to describe "incompetent" staff members gave many responses. One superintendent thinks that they divide into two groups: "Those who don't have it" (who lack teaching skills) and "those who don't use it" (who are able, but don't give adequate effort).

Others generally grouped incompetent teachers into these categories:

- New teachers who lack the temperament, patience and compatability both to get along with young people and to plan effective teaching. Also included in this category are some new teachers who are inadequately prepared to teach, who lack basic skills and who are, in the words of one educator, "real lulus."
- Mass hirees who were employed during the periods when teachers were in short supply. "Now," said one Texas superintendent, "we face the probem of removing some of them to make room for some of the highly skilled practitioners coming out of colleges."
- The emotionally troubled, whose problems may be rooted in home or professional areas.
- Veterans who cannot keep up — who may be experiencing a late career slump or who have lost their drive, interest and adaptability or who have trouble handling newer instructional programs or different student bodies.

## The Legal Definition

**Legally, incompetence means what the courts have said it means in specific situations.** "Courts have tended to define what is and what is not incompetence in light of the facts unique to the particular case," say Rosenberger and Plimpton. In doing so, courts have kept to an indefinite and broad meaning which, according to the Pennsylvania Supreme Court, gives a much wider meaning than a direct definition.

According to one legal definition, incompetence always refers to the kind of work in which an employee is engaged. But the term has been construed to include "something more than physical and mental attributes . . . and may include want of qualifications generally, such as habitual carelessness . . . and it may be defined as meaning disqualification, inability, incapacity, general lack of capacity or fitness, lack of special qualities required for a particular purpose or the want of ability or fitness."

A good description of legal interpretations of incompetence is given by Harold Punke in *The Teacher and the Courts* (Interstate: 1971). He says courts have held incompetence to include "unfitness to meet the general demands of the position." Consequently, teachers have been declared incompetent when they had scholastic ability, but lacked good judgment. They have been judged to be incompetent in very specific circumstances, such as for failure to inculcate patriotism and respect for law and order in time of war. Other judgments of incompetence have been based on:

- Insubordination (refusal to obey a reasonable board rule).
- Poor learning attainment by pupils.
- Poor physical fitness.
- Assault on pupils.
- Lack of continuous professional growth.
- Negligence of duties.
- Absenteeism.
- Failure to obey school rules or to assure that students followed them.

### The union view

## 'Incompetence Is Not the Issue'

**Using set standards of competence does not fare well with the unions. Albert Shanker, president of the American Federation of Teachers, attacks their use on three counts: They lack a research base, they treat the teaching job too simplistically and they are aimed at nudging high salaried teachers out of their jobs.**

**"Many states and local school districts have welcomed the current focus on accountability because it gives them grounds for criticizing or even firing teachers — particularly the more expensive ones," he contends. "Since there is no research to tell us which competencies are valid, the selection of which competencies are to be required could change from year to year, depending on the political wishes and financial circumstances of the states and local school boards.**

**"What all of this ignores," Shanker continues, "is the complexity of factors that contribute to student growth. It also ignores the need for teaching to be viewed as a process involving abilities of diagnosis, analysis and understanding, as well as the performance of isolated skills." In other words, he believes the teaching job is not easily susceptible to definitions of competence.**

**More succinctly, Mary Bergen of the California Federation of Teachers argues: "Incompetence really is not usually the issue. The issue usually is a person who rocked the boat."**

Another legal authority said "incompetence is usually manifested by a pervasive pattern of behavior resulting in a lack of classroom organization and harmony, and dissatisfaction on the part of the pupil and supervising authorities."

Tennessee law provides this further definition:

". . . being incapable; lacking adequate power, capacity or ability to carry out the duties and responsibilities of the position. This may apply to physical, mental, educational, emotional or other personal conditions. It may include lack of training or experience."

Conduct outside of the classroom may be considered by the courts in determining competence. The U.S. Supreme Court pointed out that there is "no requirement in the federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends upon a broad range of factors."

Lawyers look at court cases when they want to determine what will be upheld as "incompetence." Rosenberger and Plimpton found in analyzing cases that incompetence charges against teachers often are based on:

- *Teaching methods*, including failure to maintain classroom control, failure to adapt to current teaching techniques, physical mistreatment of pupils and poor lesson organization.
- *Effects on pupils*. Courts have upheld the dismissal of teachers who couldn't get along with pupils in their classes, who failed to keep self-control, who caused low morale or fear among pupils and who related personal financial or sexual matters in class. In addition, several courts have upheld firings based on such charges of low pupil achievement as "his testing results were poor," "her pupils did not learn very much" and "pupils have not progressed in your class in accordance with their abilities."
- *Teacher's personal attitude*, including tardiness, refusal to teach, refusal to accept supervision and lack of concern or courtesy. A teacher who brought her record player to class so she could doze while children listened to music was dismissed. So were others who refused to allow supervisory personnel to enter the classroom, who failed to cooperate with other teachers and who showed lack of self-restraint and tact in dealing with co-workers, pupils and parents.
- *Knowledge of subject matter*. Teachers have been dismissed for specific errors of fact in history and geography and for lack of knowledge of English grammar, spelling and punctuation.

## Incompetence a la Nolte

For the purposes of board members and administrators, perhaps the best definition of an incompetent teacher is that offered by Chester Nolte. He describes an incompetent teacher as one the courts find to be performing at a subacceptable level after having been warned, helped, counseled, cajoled, threatened and/or urged to resign. This "shape up or ship out" attitude, moreover, must be in response to specific defects in the teacher.

One point that administrators and boards must keep in mind is that "we are a nation of average teachers," Nolte says. He adds: What the law anticipates — even requires — is not extraordinary teaching, only average. "If a teacher is substandard or even poor, that's not incompetence," he notes.

To make that point even stronger, he emphasizes: There are only two kinds of teachers — those who are above the accepted performance line and those who are below it. Districts determine what is acceptable performance.

Another point to keep in mind: With the increased supply of teachers, the line between barely acceptable and not acceptable has virtually disappeared, Nolte says. He believes the average is going up all of the time, which means that boards and administrators may expect more from teachers.

Thus, in a Wyoming case, four high school teachers were nonrenewed because the principal said he could get better teachers for the money. The court upheld the nonrenewals. "We can now make a case for dismissal because we can do better," observed Nolte.

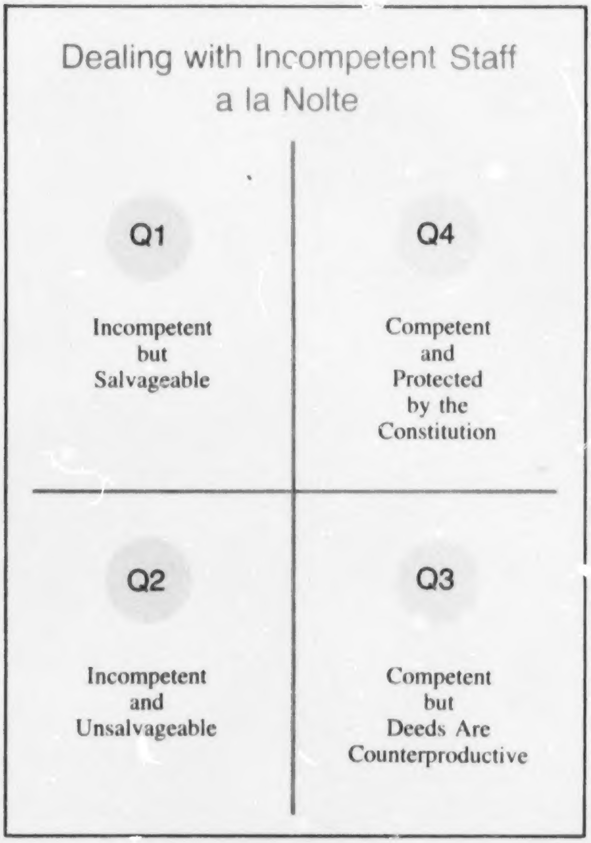
Nolte uses a four-part quadrant to help administrators and board members understand different types of situations and cases involving elements of competency and incompetency. He also cites important lessons for administrators and boards in dealing with each different situation or case:

Quadrant 1 represents the "*incompetent but salvageable teacher.*" The chances of separating such a teacher from his job are not good.

An example of a teacher in this category would be a beginning teacher who, according to the courts, must be given a more than even chance to succeed. This could mean that the teacher must be notified of how, when and under what conditions he will be evaluated during the school year. "You can't, for instance, wait until the end of the year, without any previous communication between the teacher and the principal, and then suddenly decide to nonrenew on the grounds of incompetence," advises Nolte. "Some of this 'incompetence' is due to administrative lag in doing what needs to be done."

A district cannot arbitrarily decide what is and what is not remediable. In a Washington case, for example, the Appellate Court found these deficiencies to be remediable: a finding that the teacher had made no effort to maintain an effective classroom atmosphere, that the teacher had permitted students to deface classroom property, that the teacher made public parental complaints directed against him, and that the teacher permitted students to fix their own grades and exposed them to materials irrelevant to the purpose of the course. The court said although the charges constituted sufficient cause to discharge the teacher, they could be characterized as remediable deficiencies requiring the district to give notice of deficiency and a probationary period for their correction before discharging the teacher.

Dealing with Incompetent Staff a la Nolte


Q1
Incompetent but Salvageable
Q4
Competent and Protected by the Constitution
Q2
Incompetent and Unsalvageable
Q3
Competent but Deeds Are Counterproductive

Nolte says a district must use every asset it has to help a teacher improve. Unless such assistance is given, the dismissal of an "incompetent" teacher may be reversed by a court. This means, too, that a district must be able to *document* what it has done *in detail* to help remove remediable defects.

Quadrant 2 represents the "*incompetent and unsalvageable*" *teacher*. The chances of separating such a teacher from his job are good.

Included in this category is the teacher who is near being placed on tenure with the next contract. "This is a crucial legal area," Nolte advises. Many suits are entered to try to require a board to rehire a teacher at this stage.

An example in this category is the case of a Florida teacher whose continuing contract was canceled by the board because she demonstrated an inadequate command of standard English. The evidence: her continuous use of double negatives, confusion of verb tense and misspellings which were repeated by her pupils and improper handwriting and letter formation (also repeated by pupils). The evidence was supported by testimony given before the school board.

Cases involving the nonrenewal of teachers in this category — teachers who are incompetent and who fail to improve — are "almost universally upheld" in favor of districts by the courts, Nolte says.

Quadrant 3 represents the "*competent teacher whose deeds are counterproductive.*" The chances of separating such a teacher from his job are good.

Some of the teachers in this category have reached tenure protection, others are probationary teachers. Nolte says they all have one thing in common: "they do something dumb."

An example: A Florida biology teacher (nontenured) who talked about his personal sex life in class and criticized the board and the school. When the board refused to renew his contract, he claimed he had a right to freedom of speech in the classroom. The court held that he might have the right to exercise free speech in his acts of criticism, but that he had no such right with respect to his personal sex life.

Nolte advises that a board wishing to dismiss a tenured teacher whose case fits this category must follow the state tenure law to the letter. If exercise of a Constitutional right is involved as well as tenure, the teacher must convince the court that the dismissal was based on exercise of that right. The burden of proof then shifts to the board. It must find enough grounds to support a claim of incompetence and dismiss on that basis.

**Quadrant 4** represents the *"competent teacher who is protected by the Constitution."* The chances of separating such a teacher from his job are nil.

Teachers who fit into this category are sometimes called "incompetent" by the board because they do something that the board does not like. The "something" may be irksome, controversial or divisive; nevertheless, it is Constitutionally protected.

An example is a 1975 case in New Jersey in which a college journalism teacher wrote an editorial in the school newspaper. It alleged a conflict of interest by the chairman of the college trustees in awarding a contract for audiovisual equipment to a company in which he was a board member. The company was owned by his nephew. The teacher was fired three days before she would have gained tenure for what the board of trustees said was violation of her duties and responsibilities as a teacher of journalism and adviser to the college newspaper. A Superior Court judge ruled, however, that the teacher's academic freedom had been violated. He ordered her rehiring and payment of damages.

## What Is Counterproductive Conduct?

In dismissing a teacher for any of the 22 causes that are generally classified as counterproductive conduct, districts must follow specific rules. They must show that the conduct adversely affected district program(s) and that the teacher was aware that the conduct was not permitted.

Here's how courts have viewed some of the most common uses of these causes for dismissal:

**Criminal conviction:** Merely being arrested is not a basis for dismissal, nor is guilt always sufficient reason, especially in states that limit the cause to certain serious crimes. However, guilty conduct that shows potential harm to pupils is supported by courts as a cause for firing. An example: An Arizona teacher visited a bar one evening, got into an altercation and was arrested; he pleaded guilty to disturbing the peace, being under the influence of intoxicants, attempting to fight and displaying a gun; his dismissal was upheld by a court.

School boards can conduct their own hearings on aspects of criminal charges made against a teacher and can dismiss a teacher who is found not guilty in a criminal court.

**Inefficiency.** In the court's view, an inefficient teacher is one who is capable and competent but who teaches in a careless, ineffective or inefficient manner. By contrast, an incompetent teacher is one who is not capable of adequate performance.

**Drunkenness and intemperance.** A connection must be shown to the teacher's school performance. In one case, a teacher was dismissed after being arrested for the third time for driving drunkenly. The dismissal was reversed because no connection was shown to his classroom service. In another case, a court sustained the dismissal of an Illinois teacher who had appeared on the street several times in an intoxicated condition and who had been arrested several times and become the subject of talk in the community. The court noted that the dismissal was based on the results of the teacher's drinking, not just on the fact that she did drink.

**Drug use.** A California court said that mere conviction for possession or use of marijuana did not automatically give good cause for dismissal. Evidence must show the effect of the drug use or conviction on the school system,

### Don't Give Up

## Quick Tips on Incompetence

- **The courts have made clear that school authorities have the right to replace incompetent personnel, even though tenure laws aim to prevent the dismissal of teachers without just cause.**
- **Where state statute is not specific regarding incompetence, per se, another term may be interpreted by the courts as covering it.**
- **Just because a board member, administrator or parent says a teacher is incompetent is not sufficient proof.**
- **Hearsay, gossip and petitions are not sufficient for dismissal. Collecting evidence is the only way.**
- **Legal experts say courts appear reluctant to second-guess school authorities in their evaluation of a teacher's competence, provided procedural safeguards are met and school authorities can show the connection between incompetence and proper instruction.**
- **The inability to maintain discipline is the basis for a great many cases of incompetence.**
- **Is it worth it? Consider: Lining up and supporting a principal against an incompetent teacher are parents, students, district taxpayers, some teachers, all administrators and the school board. On the other side is the incompetent teacher and, perhaps, union representatives.**

## How About Dismissing Teachers for Striking?

Dismissals based on teacher strikes usually are brought under one of the categories of "counterproductive conduct." They are most apt to result when strikes violate state law. Other legal measures that can be taken against teachers striking illegally are individual fines and jailing and the fining of their unions.

The U.S. Supreme Court's 1976 *Hortonville* decision settled one of the procedural aspects of dismissing striking teachers. The high court held that a school board is not automatically disqualified for reasons of bias from being the body that conducts the hearing and makes the decision that striking teachers should be terminated.

Writing for the court, Chief Justice Warren Burger said, "the board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violate of state law be discharged."

"Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decision maker," Burger continued. "Nor is a decision maker disqualified," the chief justice said, "simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances."

said the court in one case. It added, however, that the evidence could be in the form of testimony as to the potential danger of returning the teacher to the classroom. In another case, a teacher filed an affidavit on the beneficial use of marijuana, in support of another person on trial for marijuana use. After the affidavit gained wide attention, the teacher's dismissal was upheld because, the court said, it gave evidence of a likely adverse effect on future teaching of pupils.

**Immorality.** The rationale for this cause "is that the teacher is expected to set an example for the young minds in his or her charge by living an exemplary life of high moral character," according to Prof. Betsy Levin of Duke University. She notes, however, that the courts have become increasingly reluctant to permit deviant or unacceptable sexual conduct per se as a basis for dismissal. Kenneth H. Ostrander, a University of Washington professor, agrees. He says nonconventional behaviors practiced by teachers with discretion and with regard to their reputations, particularly when practiced in the privacy of their homes, are not likely to be upheld as reasons for dismissal.

The New York Court of Appeals said schools could be concerned with teachers' private conduct if it directly affected or impaired, through public notoriety, the capability of the teacher to perform professional responsibilities. Two examples: A California junior college teacher was discharged after being discovered in a state of undress in a parked car with a female student. In another case, however, a Texas teacher conducting himself similarly with a woman not associated with the school was ordered reinstated. The Texas court said the district had failed to show a connection between the incident and the teacher's school duties.

By itself, community disapproval of a teacher's conduct is not grounds for dismissal. A court ruled in favor of a small-town teacher who had allowed men to stay overnight in her apartment because the men were friends of her son and the town lacked hotel accommodations.

**Incapacity.** This term usually refers to a teacher's physical, mental and professional capacity to conduct classes. However, a New Jersey court upheld the dismissal of a teacher who had undergone a transsexual operation. It said the teacher's emotional and psychological impact on students could be considered in determining incapacity.

**Unprofessional conduct.** "In general, courts will not overturn findings made by a school board as to unprofessional conduct if supported by substantial evidence," says Prof. Levin. She adds: "Unprofessional conduct warranting dismissal can be conduct outside the classroom as well as conduct with regard to school matters."

A court reversed the dismissal of an Iowa drama teacher which was based on objectionable language in the class play she chose. The court said the language bore sufficient connection to the subject matter of the play and that the teacher had little reason to know that the language was considered inappropriate by school authorities. The firing of a New York elementary teacher was upheld, however, because she called third, fourth and fifth graders a variety of profane names.

**Just cause.** This is a catch-all category, says Delon. Its nature varies from state to state, and not all have it in their laws. Generally, a district must prove that a teacher should have been on notice to refrain from the accused conduct and that the conduct caused harm to the school system.

**Insubordination.** Prof. Delon calls this the most frequently used cause for dismissal because it is easier to prove than some other causes. In addition, he says, defiance of school authorities is becoming more common as schools move toward industrial-type collective bargaining.

Often, more than one incident will be needed to establish insubordination, says John C. Walden of Auburn University. But, he adds: "Even in the absence of statutory law, courts will generally support the dismissal of an employee who fails to follow the legitimate orders of his or her superior or who is so verbally abusive of superiors that the school's effectiveness is impaired." And Bartholomew J. Ciampa of Maine's Nasson College finds that "great discretionary latitude is employed by the courts in determining the reasonableness of the violated school board rule or regulation."

Delon divides insubordination into eight kinds of cases:

- *A local residence requirement for teachers.* School residency rules reaching the courts have been upheld.
- *Failure to achieve required professional growth.* This charge may result when teachers do not take the units or course work required by district rules.
- *Unauthorized absences.* One court upheld the denial of scheduled salary increases for teachers who refused to report to work on Columbus Day. The day was a legal state holiday, but school districts were authorized to conduct classes if they wished. But a West Virginia teacher's suspension for missing 4-3/4 hours of the first day of school while he registered for an evening university class was held to be too severe a penalty. (The teacher had tried to contact school officials.)
- *Corporal punishment.* When the use of corporal punishment violates district rules or directives, insubordination may be charged.
- *A teacher's personal appearance.* "The school board probably will have the burden of showing that the particular mode of dress or grooming it seeks to alter has an adverse impact on the teacher's classroom performance or runs counter to some valid educational objective," says attorney Thomas Flygare of Boston. He adds that a school board's rule on this point will probably be upheld by courts. The exception would be if the rule infringes on some Constitutionally protected activity.
- *Teacher protest.* This category could include refusal to say the Pledge of Allegiance, wearing an armband or engaging in some other manner of personal expression which is protected by the Constitution. Many of these reasons will not be supported by courts as the basis for dismissal, although judges do distinguish between teacher conduct within and outside the classroom.
- *Curricular decisions.* Courts tend to rule that decisions on subject matter, teaching methods and materials are within the authority of school districts to control. Teachers often win cases, however, when districts have no written rules.
- *Employee-supervisor conflicts.* An example: a teacher who called the director of secondary education a liar at an open faculty meeting and who attacked the honesty and integrity of the entire administrative staff. His nonrenewal was upheld. Another example: A Minnesota court backed a school board in its firing of a teacher who repeatedly refused to fill out required evaluation forms.

## What Can Be Done?

Administrators responding to the **Critical Issues** survey for this report generally expressed more pessimism than optimism regarding their ability to successfully dismiss teachers they consider "incompetent." Few administrators can say as did one Missouri superintendent: "We asked three teachers to leave, and they did."

Dismissal is one way to get rid of incompetent teachers who cannot be improved, but many administrators believe the road to dismissal is fraught with potholes — tenure laws, due process procedures, human reluctance to downgrade another individual.

What is needed? "Strength, wisdom and lots of courage," prescribes one administrator. Another counsels: "Dogged administrative pursuit." Also needed is a top to bottom evaluation/documentation system.

**Dealing effectively with incompetence,** according to administrators who have been successful in doing so, involves solving four problems:

**Problem 1:** *How can incompetence be identified?* A district must have an evaluation and observation system that can discriminate between bad, good and excellent teaching and can document its findings. Almost all (96 to 98 percent) districts evaluate teachers. Many evaluations, though, are "going through the motion" exercises only, done by principals without the time, training or system to produce results usable for improvement or dismissal. But some districts

### 'Atrocious'

**Some persons may differ on what amounts to incompetence, but the school board in rural Goochland County, Va., felt the case of one elementary teacher was clearcut. The teacher, a veteran of 12 years in the system, handed out social studies questions to third and fourth-grade pupils, including these:**

**"What did the sculpture told the archologists?"**
**"Why did the Maya sailed to other ports?"**
**"How many names did each Maya had?"**

**The school board voted to discharge the teacher. Said Supt. Roland P. Clement: "The teacher's grammar was atrocious."**

reported designing and using evaluation systems based on real school needs and on real measurements of classroom success and failure. When run in a way that gives due consideration to the time and effort that evaluation takes, these systems give results that are usable.

**Problem 2:** *How can an incompetent teacher be improved?* Both common sense and the courts require that assistance be given to a teacher whose performance is below par. A genuine effort for improvement must be made. Many district agreements with teachers unions now require it. Yet, the problems are many: no funding, difficult planning and a general lack of conviction that improvement actually can be made. Still, a growing number of districts are building "intensive care" responses into their evaluation systems and are finding ways to improve teachers who need help.

**Problem 3:** *What if the teacher doesn't improve?* The question here is whether to dismiss or to try some other course: transfer, a change in job category, request a resignation, take disciplinary action or just put up with it.

**Problem 4:** *How to win a dismissal case?* An administrator who decides to push for dismissal needs to be ready to face four things: frequent weak evaluations and documentation, strict court scrutiny of teachers' rights, state tenure laws and, frequently, teacher union protection of members' job security.

These problems require careful planning and scrupulous attention to detail. Yet, superintendents and boards in many districts — backed by advice from their lawyers and documentation — are winning their fights against incompetence and unsatisfactory job performance.

CHAPTER II

# Alternatives to Dismissal

> "Teachers are often exposed to the vague expectations of administrators, the pressure of always being on top of the subject, the behavior of other teachers, the sometimes conflicting demands of parents and the raw nerves of students. The administrator who is aware of these possible sources of anxiety concerning job satisfaction and performance and who acts accordingly is the one who can respond most humanely."
>
> **Improving School Staffs**
> AASA

There is no magic formula for determining how best to deal with an unsatisfactory teacher. As the quotation above suggests, awareness of the school situation is important. Due process requires that assistance be offered but, beyond meeting legal requirements, the type, time and amount depend on the individual case. Punitive measures are used by some districts, as are "progressive disciplinary policies" which amplify due process requirements.

Which alternative is used — in place of or prior to building a dismissal case — depends on considerations such as legal requirements and district policy, the job situation of the employee (e.g., probationary or tenured, "always a good teacher but slipping now," or "someone we should have gotten rid of long ago"), any conditions in contract agreements and, realistically, the amount of time and money a district is willing to put into assistance plans as well as the employee's attitude and ability to improve.

Some alternatives follow.

## Better Screening at Hiring Time

Taking first things first, the best time to deal wth incompetence is at hiring time. Persons whose performance may not be up to district standards should not be hired. Administrators can afford to be choosy, because hiring teachers today is a buyer's market. Moreover, the overall quality of new teachers today is higher, and they are generally better equipped to do their jobs than were their counterparts in former years, according to experts and administrators interviewed for this report.

Still there are traps in the selection process. For one thing, teachers are very capable of "talking a good game," notes AASA Executive Secretary Paul Salmon. "A candidate may easily convince you that he or she recognizes individual differences among children. But this doesn't guarantee what happens in the classroom." Salmon suggests that administrators set up a selection procedure "that lets you get the kind of candidate you want" and set up criteria "that help teachers self-select themselves in or out of the hiring process."

Two other techniques in screening new applicants for teaching positions are used by George Plumleigh, superintendent of the Los Alamitos (Calif.) Elementary School District:

- All new applicants who pass initial screening must teach a demonstration lesson.
- All references are followed up. "Sometimes it takes a lot of reading between the lines, as to references," Plumleigh says. "You've got to ask tough questions of references, but a $5 phone call will save you headaches."

## Don't Grant Tenure Automatically

What if the teacher is hired and then is discovered to be incompetent? Evaluation expert George Redfern says superintendents and principals should approach the teacher's time prior to the granting of tenure as "very critical." "If there's any question about a new teacher, the district should go on alert. And for any teacher the district is not sure of, the second year should be the last." Redfern gives two guidelines for striking a balance in hire/fire decisions regarding nontenured teachers:

- If the teacher is in the bottom one-fourth to one-third of all teachers evaluated in the district, he should not be rehired.
- Keep in mind, however, that it is costly to keep replacing teachers. So the question to ask is, "Is this new teacher salvageable?"

Supt. Ivan W. Fitzwater of San Antonio seconds Redfern's admonition about new teachers. "If you do a good job the first couple of years, the new teachers don't slide by, establish roots in the community and take out mortgages."

Some districts have devised plans to salvage new teachers as early as possible in their careers.

**One Oregon district,** for example, uses an "alert system" to notify probationary teachers that they may not receive tenure at the end of their third year. New teachers are placed on alert by Sept. 30, and an initial conference is scheduled by Oct. 15 to discuss the area of incompetence and try to rectify it. A re-evaluation conference is scheduled for Dec. 15, with another follow-up conference two months later. Final notification of employment status is required by March 15.

**In the 1,700-student Hartford (Mich.) Public Schools,** the local teachers association assigns "teacher coaches" (tenured teachers) to help probationary teachers get through their initial evaluation visits. The teacher coaches also make recommendations to the principal regarding the employment status of the probationary teachers and draw up, with the principal and teacher, a plan of improvement when performance falls below satisfactory.

## Improvement Plans

For the tenured teacher who is thought to be incompetent, many different courses of action may be taken to help the teacher improve. To illustrate: The Jefferson County Board of Education, Birmingham, Ala., lists as part of an evaluation checklist more than a dozen alternatives. They include: visiting other teachers, local or county inservice training, formal training and development of a professional growth plan.

Some districts set up committees of teachers and administrators (and possibly board members) to meet with a teacher in determining how deficiencies are to be corrected. Another alternative is to use other administrative personnel to confirm the original evaluator's "diagnosis" of deficiencies and to draw in specialists in devising improvement plans.

**The Kent (Wash.) Public Schools** lists the following kinds of assistance to be used in addressing teachers' shortcomings: supervisory visits and conferences with administrators, assistance from department head or program specialists, involvement of a counselor or other district employees, collegial visits by other classroom teachers, use of video taping to assist in analysis of teaching, attendance at conferences or workshops, provision of specific professional materials and contractual employment of an outside consultant. Regarding the last item, the district advises: "Use with caution."

**Another warning from an expert:** Keep in mind that the teacher is responsible for being professionally prepared. Districts should cautiously approach agreements to pay for trying to bring unsatisfactory teachers up to par.

**How much time for improvement?** A key concern in dismissing staff is how much time must be allowed for improvement. Some experts advise that anything less than six months is inadequate. One state specifies 90 days but allows an additional 15 days for an employee to submit a statement opposing charges and 45 days for the board of education to determine if there is probable cause for dismissal. The New Mexico State Board of Education adopted new regulations in January 1977 requiring two or more conferences prior to notice of discharge or termination. And some districts have written into their policies a requirement that teachers must receive three warnings followed by reasonable time for improvement.

Aside from legal requirements and district guidelines, several superintendents said that "actually making the decision to keep or fire a teacher is pretty subjective." Said one: "You have to use all of your experience in deciding, because there's no magic moment." Another consideration: In deciding to go for dismissal, more time must be allowed now than in the past. The reason is simple: The job market is tight, and many teachers will fight to hang onto their jobs.

## Retraining Efforts

Some districts have corrected inadequacies in some staff members by requiring — or at least strongly suggesting — that every staff member participate in retraining efforts.

**In the Richmond, Va., schools,** for example, a large percentage of secondary students were reading two or more years below grade level. Furthermore, too many teachers had not taken courses in reading instruction. The district adopted a policy requiring all elementary teachers and all secondary English teachers who had not taken a reading course in the previous five years to take a college-level course. Another provision was that all new teachers had to take reading at their own expense before being hired.

## A Lesson in Granting Tenure

**Here's the scenario: A new teacher is hired. The principal is already too busy. Evaluations are matter-of-fact. The teacher receives tenure. The following year, the principal suspects the teacher may be incompetent. The principal arranges a transfer (and provides a suitable recommendation), so that the unsatisfactory teacher can get a second chance (in somebody else's school). The same pattern of below-par performance prevails. What's the second principal to do?**

**Here's one solution currently used in some districts — unwritten though it may be. The principal who approved tenure for the unsatisfactory teacher gets the teacher back. One California superintendent explains that the technique is very effective in cases where the principal "corrects" mistakes by arranging transfers. "We simply say to the principal that if the teacher doesn't work out in the new school, 'we will initiate the second transfer and you get the person back.'"**

**Another variation on the same theme is to transfer an incompetent (tenured) teacher back to the building of the principal who gave the last favorable evaluation.**

**Another example: The Los Alamitos (Calif.) Elementary School District** requires all teachers to have certain competencies, including being able to diagnose student needs and plan programs for individual students. The skills needed by the teachers are taught through the district's Professional Development Program. It is voluntary and paid for by the district. At first, said Supt. George Plumleigh, only the best teachers volunteered for the program, but they established it as worthwhile. Now, he says, nearly all of the district's 160 teachers have gone through it. The district has an additional club to hold over the heads of teachers. Annual salary increments are refused to any teacher who gets an "unsatisfactory" rating in any of the district's five major evaluation areas. About one teacher per year has a salary increment withheld because of an unsatisfactory rating, Plumleigh said.

## Putting the Squeeze On — Dollar-wise

Various districts and some states have devised plans to put economic pressure on teachers who are below par:

**Withholding of increment.** Under New Jersey law, the annual increment may be withheld from a tenured teacher who does not meet teaching requirements.

**In the Denver Public Schools,** teachers cannot get their annual increment without a "satisfactory" rating. The provision, which is not part of Colorado state law but was obtained by the Denver district through arbitration, requires the due process steps of advance notice and evaluation.

**The 3,300-student Pekin (Ill.) Community High School** has a negotiated agreement whereby a teacher's salary can be frozen a year at a time based on unsatisfactory performance. Supt. William H. Holman believes the practice discourages incompetent teachers.

A teacher who has his salary frozen receives the same salary for the following contract year as was received during the year in which the deficiency occurred. If the deficiency is corrected during the year, the teacher regains the salary he was receiving at the time of the deficiency. If, on the other hand, the index multiplier is frozen, the teacher remains on the same step of the salary schedule. If the deficiency is corrected during the year, the teacher advances to the next step on the salary schedule the following year.

**Is it legal?** Chicago attorney Jerome N. Robbins says he believes that school boards in most states have the legal power to negotiate a clause allowing them to deny an increment to a teacher who is less than satisfactory. "The increment is based on the theory of improvement during the past year," he notes.

## Counseling Out

Whether it's called "easing them out," counseling or forcing a resignation, by any name this is one of the most frequently used and widely advocated means of removing unsatisfactory teachers. Some administrators view it as the only alternative when improvement is impossible and they lack good documentation to build a case. Others say that evidence of incompetence must be overwhelming and when the teacher reviews it, a resignation will follow.

Some superintendents suggest various ways to sweeten the easing out process. One Missouri superintendent says, for example, that he offers incompetent teachers an extra month's salary "to get the hell out." A Wisconsin superintendent arranges for two weeks' bonus pay for teachers who resign after being asked.

Another means of prompting an unsatisfactory teacher to leave, some administrators attest, is the use of "fair pressure." A superintendent of a small district in Massachusetts who uses that technique admits that even then, "resignation may take great time and effort." A California administrator who says his district "has had very good luck with counseling out" advises that teachers will resist if they feel they have been mistreated in evaluations or otherwise.

Several administrators said in interviews for this report that representatives of the local teachers union brought resignations to them after they had investigated incompetence charges against a teacher. In one case, a union representative delivered a resignation 30 minutes before the hearing was to start.

One suggestion for counseling unsatisfactory teachers out of their jobs is to let them compare their quality with that of their peers. "Some see that their performance is so inferior that they will seek help, retire or resign," notes an adminstrator who successfully uses the practice.

## 'Progressive' Discipline

Some districts use what they call a system of "progressive" discipline in dealing with teachers who are below par. Many of the elements are the same as required by due process. They include:

- An oral warning.
- Written warnings.
- Offers of assistance.
- Written evaluations.
- Suspension.
- Withholding of pay.
- Dismissal notice.

In one district which uses a progressive disciplinary system, the superintendent says "it gives principals a means to get to dismissal if necessary."

He advises other administrators interested in starting such a system to:

- Distribute copies of the disciplinary policy to teachers and display it in a prominent location.
- Spell out the rights of redress for employees.
- Keep rules reasonable and few in number.
- Keep penalties in line with violations.
- Keep agreements with teachers and unions as flexible as possible.
- Inform representatives of teachers unions any time an employee/union member is given a "final warning" in the disciplinary process.

### 'Put Yourself in Place of the Parents . . .'

## Does It Really Matter If a Teacher is Incompetent?

What effect does an incompetent teacher have?

That question was put to administrators interviewed for this report. One superintendent replied: "I don't think in the main that one incompetent teacher has a disastrous effect on a group of kids. Say some students have a bad year in the fourth or fifth grade — they bounce back. Kids overcome."

That same superintendent was concerned, however, about the image an incompetent teacher gives to a child. Thus, he said, the most harm probably is done by an incompetent teacher in kindergarten or first grade "because that is when a child is making up his mind about himself, and that's going to last a lifetime."

As a postscript to the conversation, the superintendent commented: "When you compare what happens when there is a competent teacher in a class, there's a big difference in what happens to kids."

Another superintendent said he believes the effects of incompetence depend on the individual child. "To some, it might not be so detrimental . . . . It would be harder on elementary students than those in secondary school because 'bright, motivated' secondary students are going to teach themselves in spite of the teacher."

But, listen to this comment from Supt. Hugh E. McGuigan of the Port Washington (N.Y.) Union Free School District: "Counting kindergarten through the 12th grade, we only have students for 13 years. The fact that children may be resilient is something I don't think we should bank our supervisory process on. If we waste one year of 13, that's a horrendous percentage of a kid's formal education."

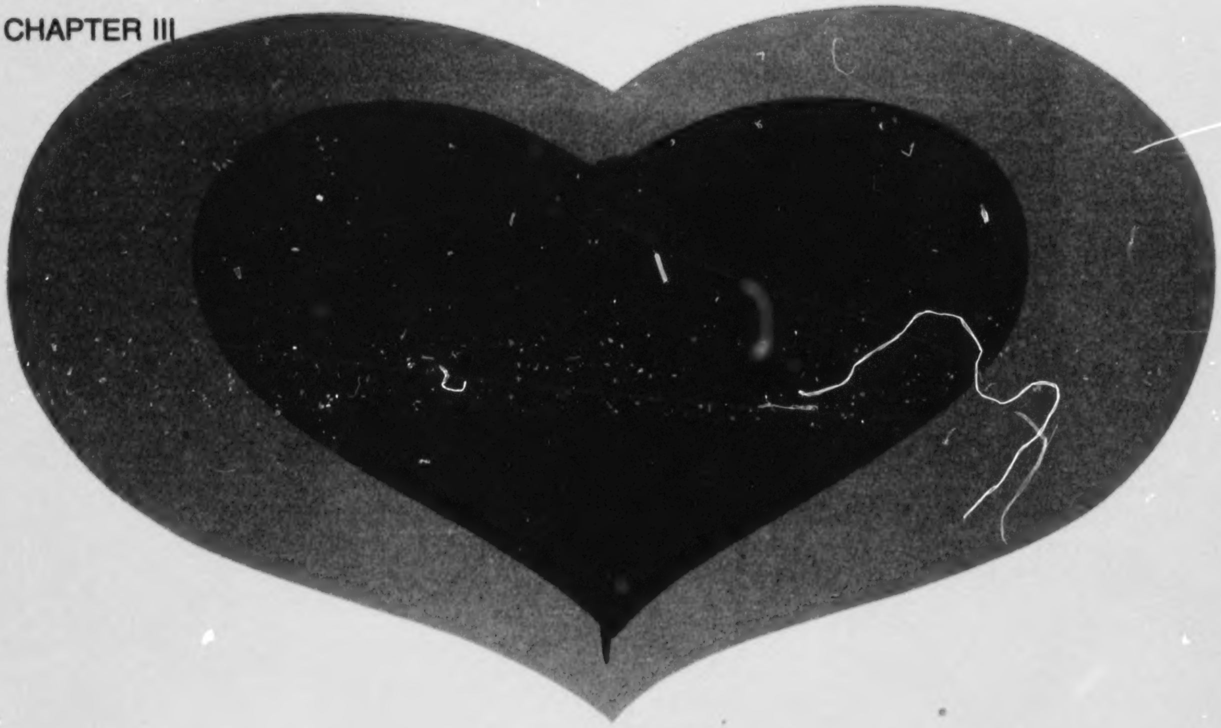
A Virginia superintendent said point blank that "the perpetuation of incompetence damages the instruction program and, most importantly, the students."

Some administrators felt so strongly about the effects an incompetent teacher has on students that they suggested the dismissal of any principal who would not "do something about such a situation."

In more direct fashion, A. Dean Speicher, superintendent of the Penn-Harris-Madison School Corp., Osceola, Ind., said:

"We're a service organization. The delivery of services to our clients is our most important thing. All you have to do is put yourself in the place of the parents. If it's not good enough for my kids, it's not good enough for the 35,000 other parents in our school district."

## CHAPTER III



# Evaluation:
## The 'Heart' of the Dismissal Process

One school attorney interviewed for this **Critical Issues Report** called evaluation "the heart of the teacher dismissal process." Some administrators agreed. They said "a good fair system of evaluation — one that works — is the key to any fair dismissal." Yet, some legal experts contend that evaluation results alone do not offer the kind of evidence needed for dismissal.

The main problem — which perhaps accounts for the skepticism of legal experts — is the often ill-defined purpose of evaluation. Traditionally, evaluation has been viewed as a way to make personnel decisions, e.g., hiring and firing. But its other purpose is to improve teachers and teaching. When evaluation is mentioned as part of state statutes on teacher contract laws, the tendency is to tie it obliquely to the dismissal process. Several states recognize improvement efforts as an important part of the evaluation process; others mention improvement only as a due process requirement. So, while state statutes mostly ignore the Catch-22 quality of improvement as a part of evaluation, administrators have to grapple with it.

The irony of the dilemma is multi-faceted: En masse, teachers don't like incompetent peers; individually, they don't want to lose their jobs. They don't mind being evaluated if improvement is the aim; they resist when their bread and butter may be taken away. Having an entire staff jittery about keeping jobs means less concentration on the primary job of teaching. But tolerating a lower standard for a few staff members forces the majority into either acknowledging and ignoring it or, maybe worse, accepting and adopting it, too. At any rate, someone must do double duty for those who are doing partial duty, or students are the eventual losers.

Administrators want to keep good staff members and get rid of bad ones, but the latter action requires hard evidence. It can be obtained through tough evaluations, but easy evaluations are easier to do and don't threaten staff security. Moreover, teachers unions, often serving as the voice of the local staff, are bargaining harder on evaluation. They see improvement, not making personnel decisions, as the primary purpose of evaluation. The unions' main function, after all, is to provide job security. And on it goes.

## Improvement and Decision Making: Compatible?

Are evaluation for the purpose of improvement (sometimes called "formative evaluation") and evaluation for the purpose of making personnel decisions (called "summative evaluation") compatible? Some experts say yes. Evaluation expert Richard Manatt says, for example, that "administrators improve instruction through supervision, and they terminate through due process of law and tough-minded decision making. Thus, valid, reliable and legally discriminating performance data become management information which 'can go either way.'"

Manatt adds: "Obviously, 99 percent of the teachers are involved only with improvement, but there exists a certain prod of accountability when all know their performance and productivity are being monitored." To lower the anxiety of teachers, Manatt notes, some districts use two different types of evaluation instruments.

**What Administrators Think:** Administrators interviewed for this report expressed differing views on whether evaluation can be used simultaneously for improvement and dismissal. Kenneth H. Loflin, superintendent of the Oak Ridge (Tenn.) Schools, says: "It's not that difficult to build an evaluation document that works both for formative and summative evaluation." In his district, the evaluation document is used mainly for improvement, but it is considered useful to have when dismissal is a possibility. (See the case study on the Oak Ridge system of evaluation at the end of this chapter.)

On the other hand, Ivan W. Fitzwater, superintendent of the North East Independent School District, San Antonio, Tex., believes evaluation and rating of teachers are "absolutely incompatible." (See the case study on the North East system at the end of this chapter.)

Another administrator, Everyl Alsberg, K-8 director of instruction for the La Canada (Calif.) Unified School District, says evaluation for improvement and dismissal "are compatible." Alsberg handles improvement efforts in her district, while the director of personnel deals with removal of incompetent teachers. "Before we separated these two functions," she said, "evaluation was really very hard to handle."

The La Canada system works like this: Objectives are written for each teacher as required by California law. Teachers receive reviews when problems arise. At that time, the director of instruction serves as a "positive improvement person." If that appears not to be working, the principal calls the personnel director to begin setting up documentation. Together, they start keeping a file, looking at past records of the teacher and keeping a schedule of conferences, improvement efforts, misdeeds and warnings. The personnel director delivers a notice to the teacher if one is required. Alsberg says the chances of improving a person who is "really bad" are slim. "You can change a few," she says, "but the odds are pretty much against you."

Another California administrator, Rudy R. Gatti, superintendent of the Santa Clara Unified School District, believes that a district's evaluation program must deal with both improvement and dismissal. His district uses a remediation program which is similar to the plan used by the Salt Lake City schools. (See the description in this chapter.)

Santa Clara's program starts when a principal finds out about a teacher with problems. The principal recommends to the personnel department that the teacher be placed on remediation and a team works out a program. The teacher can choose the person to provide assistance to him. The remediation effort lasts up to five months. Gatti believes the chances for improvement using the program are "fairly good," and depend on the kind of help, honesty and "setting up the right kind of remediation program." The teacher, he says, must have the proper frame of mind and attitude to want to improve. "Without that, you had better move them out for sure."

## How Good Is Current Evaluation?

A good evaluation system "should make a good teacher look good and a bad teacher look bad," says Paul Salmon, executive director of AASA. "It should be one that gives administrators ample room for making decisions." Another view is that a good evaluation system should ascertain that the school's and the teacher's instructional objectives are met.

How well do current evaluation systems tell the difference between good and bad teachers? "Not as well as they should," says George Redfern, an expert on evaluation who works as an independent consultant to school districts. Prof. Dale Bolton of the University of Washington agrees. "There's tremendous variation in the evaluation systems now in use," he says. "They range from abominably poor to very good."

## Why Are They Poor?

AASA said in *Teacher Tenure Ain't the Problem* that evaluation practices are "careless or nonexistent" in too many districts because of "fear, indolence, lack of imagination among educators" and a feeling of futility about effectively dismissing a teacher with evaluation results.

Prof. Bolton points out, however, that how well any system is used often depends on the extent and effectiveness of the training of those who have to make it work. "The best design in the world, if it's poorly implemented, is going to result in chaos," the professor says. He compares a good evaluation system, poorly implemented, to a spiffy new triple option system instituted by a football coach who doesn't get better players or doesn't train current players to use it. The system, under such conditions, just results in a different way to fumble the ball.

## How To Tell a Good System

How do you know when your evaluation system needs improvement, or if it is good and sufficient, as is?

Redfern advises that administrators must first determine the purpose of their evaluation system and if it is meeting that purpose. If the purpose is "to improve the performance of the individual," is it really doing that? Is there proof that it is? If the purpose is "to eliminate incompetence," is it doing that? Does the system provide proof to support dismissals?

If the system doesn't have set purposes, it probably is a bad program, Redfern advises. He lists other questions that districts can use to determine if their system is good:

Who developed the system? "If it was developed by management and thrust on teachers, it probably won't work," Redfern says.

How do teachers feel about it?

How recently was it developed?

Here are additional questions to help determine the worth of evaluation program. (A "no" answer to any of the following questions should cause administrators and boards to reassess their evaluation policies and procedures.)

- Is evaluation derived from comprehensive personnel policies that are specific, clear and in written form?
- Is the purpose of the evaluation program clear?
- Is there provision for revising policies when necessary?
- Do the policies delineate grounds for either positive or negative personnel actions?
- Is evaluation of performance based on mutually understood, accepted and objective standards of behavior?
- Do evaluation procedures suggest specific improvements and ways to accomplish them?
- Do the procedures set a time schedule for improvement?
- Is evaluation based on the judgment of more than one person, with the final decision made by the superintendent?
- Are administrators and supervisory staff also evaluated and held accountable?
- Is evaluation a cyclical process of planning, collecting information and using that information to make decisions?

## Points To Consider

In revising evaluation systems, here are some points to consider:

**The best type of system:** Both Redfern and Manatt favor performance criteria-type evaluation that gives indicators under each performance area.

**Using a checklist:** Redfern does not favor use of checklists and rating scales because the objectives often are not well defined, he says, and what is considered a successful performance can vary considerably between the evaluator and the teacher.

**Criteria:** AASA suggests that "only items and elements which contribute directly to the instructional effectiveness of the teacher and which have been specified in advance as part of the evaluation procedure should be used."

**How about using student progress as the basis for evaluation?** Redfern says "teachers are scared to death of this." While noting that information on student progress could be misused, he says that it could indicate a goal for improvement in a subject area. Prof. Bolton suggests that goals might be set, based on pupils' past performance, thus enabling teachers and administrators to know that initial goals are at least partly realistic. "Later cycles could be more sophisticated," he notes.

**Using students as evaluators:** Controversy surrounds the use of students as evaluators. Some educators quote research stating that student ratings are little influenced by grades received in a course, by the sex of the teacher, by class size, by course difficulty, or by the teacher's popularity, showmanship or benevolence. But, teachers union representatives are much more inclined to say research shows just the opposite. Their view is that evaluations by students, if used, should be seen solely by the teacher and should not be used to support management decisions.

**Unfair practices:** The most significant unfair practices seem to be: use of irrelevant criteria, entrusting evaluations to incompetent evaluators, making no provision for rebuttal by the person evaluated.

## Principals: Key Persons, But Widely Criticized

Principals hold the key to effective evaluation, but often they are untrained, poorly prepared and inadequately supported in their role of evaluators. Consequently, they are widely criticized, particularly when evaluation results have to be used in a staff dismissal case. One lawyer judged that not one administrator in 50 knows how to properly evaluate a teacher. Sometimes, he added, evaluation documents are the best weapons that teachers have at their disposal in a dismissal case.

## Why?

The traditional role of the principal is that of educational leader. Consequently, the additional role of personnel manager may create a conflict. "Principals don't get any pleasure from raking people over the coals," says Ohio attorney Robert T. Baker. "When they sit down and talk to the teacher, they beat around the bush, say nice things. A teacher comes away with no expectation that the principal is saying, 'If you don't straighten up, we're going to fire you.' The courts are sensitive to this. If a court feels that the teacher has not really been advised of the deficiency, it is most unlikely to affirm a termination," Baker says. He maintains, too, that principals need better systems of anecdotal record keeping.

**Easy evaluations.** Another attorney interviewed for this **Critical Issues Report** says: "The problem of dismissing incompetent staff ends up with principals — who formerly were teachers — saying: 'There but for the grace of God go I.'" Evaluations used in dismissal cases verify that principals evaluate too easily, he notes. "Principals buy peace many times by not saying it as it is, and the evaluations often don't stand up to the test of a hearing." As a conse-

# Districts Will Determine the Future

Salt Lake City's answer to teacher incompetence is a remediation plan developed cooperatively with the local teachers association. "Instead of using our energies to fight each other, we have been able to concentrate on teaching and learning," says Supt. M. Donald Thomas. He describes Salt Lake City's method of dealing with teacher incompetence:

Q. How prevalent is incompetence among school teaching staffs?

A. Incompetence among school personnel is no greater than incompetence in other professional groups — law, medicine, accounting, etc. Teachers, however, are under more careful public scrutiny because they serve a large number of children and parents on a daily basis. Their salaries are paid from tax funds and are subject to more intense public evaluation. Incompetence in the teaching profession is a more severe problem than it is in other professions because parents do not have freedom to choose teachers.

Q. How do the Salt Lake City schools approach the problem?

A. We have implemented a collaborative plan with the Salt Lake City Teachers Association to evaluate every certificated staff member each year. Those who are not providing satisfactory service are placed on remediation. If it is not successful, the individual is terminated. Assistance is provided by a team consisting of the principal, the learning specialist and two members of the association. The team works with the individual for five months and makes periodic progress reports to the individual and the superintendent.

Q. Is this a realistic program for other districts, particularly those in antagonistic relationships with their teacher organizations?

A. The Salt Lake City remediation plan has already been replicated in several other districts. It can be implemented with or without the association's collaboration. Our association feels that it is in its best interest to participate in remediation. Should the association not wish to participate, the plan can still be implemented and the assistance team can be composed of the principal, the learning specialist and other members selected by the superintendent. A district does not need an agreement with the association to evaluate, to remediate or to terminate. It must, however, follow due process.

Q. Doesn't the high cost of teacher inservice programs mean that many districts simply have to forego improvement efforts?

A. Staff development is the most critical problem in education today. Because of declining enrollment and inadequate teacher preparation, districts must develop inservice education activities. Expenditures in staff development save money for most districts. I would recommend the termination of other services in order to have sufficient funds for staff development.

Q. How should a district go about building a solid evaluation/improvement/dismissal plan?

A. To develop and implement a solid plan is a two-year process. During the first year agreements with the association are obtained, a criteria for evaluation is established and a process is developed. The plan is thoroughly explained to principals, teaching staff and the board. Assistance team members are carefully trained in classroom observation: understanding the teaching act, child growth and development, process skills, learning theories and educational management.

During the second year the plan is implemented and modified as problems develop. It is important that all procedures are followed carefully and that all recommendations are made in writing. By the end of the year the plan can be implemented fully and should be an effective process for either improving the services of an employee or terminating that individual.

Q. Can teachers and the teacher organization be encouraged to act as a force for improvement of incompetent peers?

A. Teacher organizations can. Most teachers do not wish to have incompetent teachers or administrators in the profession. When given an opportunity to participate in decision making concerning individuals' competency, they will participate. They must be assured that the same evaluation machinery and standards applied to teachers also apply to administrators. In addition, teacher associations will cooperate in this area if collaborative relations are also established in other areas: transfer procedures, budget practices, leave provisions, grievance processes, staff development practices, summer school.

Q. How should principals and superintendents handle the contradictory aspects of being both a staff leader and an evaluator who sometimes must press for dismissal?

A. Principals cannot function as a staff leader and as a remediator of incompetency. They can identify weaknesses in performance and indicate areas where a teacher is giving unsatisfactory service. Remediation assistance, however, must be provided by a learning specialist with the help of teacher colleagues. The principal should be fully informed but should not be involved in massive assistance. The principal can make judgments concerning whether there has been improvement. The recommendation for dismissal is made by the assistance team. This allows the principal to participate in the process but also protects his leadership position.

Q. What will be the long-term effect on teaching staff competence of the shrunken teacher job market, high public expectancies and restricted financial flexibility?

A. Unless individual districts intensify their efforts in staff development, public schools will not regain the esteem which they once held. Declining enrollment, high public expectations and tighter school budgets make it imperative that we do better with what we already have. No massive new funds will be available to our schools. The future will be whatever an individual district permits it to become: an aging staff without the necessary skills to cope with newer trends and higher parent expectations, or a highly motivated staff involved continuously in inservice partnership between the board and the district's association. In addition, other measures may be implemented to employ new people: early retirement, more aggressive activity in project writing, liberal non-paid leave policies and forceful staff development practices.

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quence, districts frequently have to get better evidence, according to the attorney.

In the view of Don Moran, assistant executive director of the Kansas School Boards Association, principals often don't want to get into an "eyeball to eyeball confrontation." They wait too long to start serious documentation, he says, and then have "flimsy" excuses and reasons to support a dismissal. Some administrators interviewed for this report said they believed districts "are doomed" in trying to dismiss a teacher after several years of "easy" evaluations. They acknowledged that if a principal takes the easy way out in years 1-5 of the teacher's service by consistently giving "satisfactory" or "above average" ratings, the district's chances of proving incompetence in year 6 are almost nil.

Moran notes, too, that districts lose cases because of the failure of superintendents to adequately prepare staff to understand the law and dismissal procedures.

## Suggestions for Principals

Both common sense and time constraints must guide principals in their approach to evaluation. Redfern says, for example, that evaluation is about 75 percent self-done for competent teachers. In working with them, the job of evaluation should be viewed as one of helping, not inspecting. The practical aspect of such an approach is that principals can spend more time in working with teachers who are having trouble.

When a teacher is believed to be below par, the task of evaluation changes and so must the evaluator's goal. Often, the principal must set specifications because an unsatisfactory teacher may not admit to problems. Whether specifications are mutually agreed upon or imposed, the principal must maintain a helpful attitude and aim toward improvement.

Other considerations:

- **If a checklist form is used for evaluation,** Redfern suggests: "You have to decide early what the deficiencies are: tell the teacher what is wrong in specific terms, plan a course of correction, give much closer supervision and help, document the actions taken and give the teacher notice of deficient performance." Another expert suggests that a brief narrative paragraph be added to a checklist to set forth specific criticism.
- **Whether an evaluation will be of use** in trying to dismiss a teacher depends on how honestly it is completed. "It must be a true evaluation, not just a whitewash," says one school law expert.
- **The evaluation must be in writing,** with deficiencies, recommendations and sources of help indicated. Specific dates should be set for another evaluation as well as a timeline for improvement. The amount of time must be reasonable. (Up to six months has been construed to be a "reasonable" length of time for improvement.)
- **The principal should maintain vigilance and check back often to find out if the deficiencies are corrected. Note, however, that the checks cannot amount to harassment.**

## What's the Union View on Evaluation?

The National Education Association (NEA), the nation's largest teachers union, says the major purpose of evaluation should be to help teachers do a better job and to improve teacher competence. In its *Early Warning Kit on Evaluation of Teaching,* the NEA warns, however, that "if evaluation is conducted in order to hire and fire teachers, there is little liklihood that the evaluation will result in the improvement of instruction."

With the groundwork thus laid, the union advises that "wherever possible, associations should negotiate items for the evaluation of teachers."

One NEA spokesman said in an interview for this report that the union's prime interest is in having a "disinterested" third party scrutinize the evaluation procedure outlined in negotiated contracts. Further, NEA advises state and local negotiators to obtain language in contracts such as the following: "No teacher shall be disciplined, reprimanded, reduced in rank or compensation, suspended, demoted, transferred, terminated, *adversely evaluated* (emphasis added) or otherwise deprived of any professional advantage without just cause." [Just cause, simply defined, means being able to show harm to the school district.] The union says, moreover, that just cause can be meaningful protection *only if the grievance procedure ends in a final binding decision by a disinterested neutral party, that is, an arbitrator*.

NEA advises its affiliates to try to obtain provision for "several levels of appeal" if a teacher is dissatisfied with an evaluation.

**Union affiliates can be expected to object to:**

- The use of student evaluation or teachers' self-evaluations to support management decisions.
- Evaluation of the "run-in, run-out variety" or any conducted by stealth or not in written form.
- Any use of student test results to evaluate teachers.
- Peer evaluation which endangers organizational solidarity.
- The use of computers for storing information on teachers and their work performance.
- Evaluation by a subject matter specialist if a teacher is found deficient in subject matter competency.
- Training or testing of evaluators. (Instead, bargainers are advised to rely on grievance procedures.)

- **Simply alleging a conclusion is not adequate** for a dismissal. In other words, districts cannot win cases on the basis of "unsatisfactory" checkmarks on an evaluation form. Similarly, caution is prescribed in depending on ratings. Robert Baker explains: "Let's say the sheets rate teachers from 1 to 5. On about two-thirds of them, the teacher is rated 'average.' On the rest, one-half show 'substandard,' and the other half, 'above average.' As far as the courts are concerned, we're talking about average teachers." The conclusion: More evidence is needed.

Although some experts believe that the evaluation of a single principal, carefully documented and substantiated, plus the principal's testimony, are adequate proof of incompetency, others advise the recording of incidents outside of the evaluation process.

## What the Critical Issues Survey Found

School districts responding to the survey for this report view evaluation both as a means of making personnel decisions and of improving teachers and teaching. There was great variation in their responses, however. Some list up to a dozen purposes of evaluation, ranging from "to give information for the improvement of a teacher's classroom performance" all the way to a provision for "letting employees know what are district expectations."

**What's Rated or Evaluated.** Standards of competence used for evaluation purposes may judge a teacher as a person ("reacts calmly to unexpected circumstances"), as a counselor of students, as a subject matter specialist, as an evaluator of students, as an instructor and as an adult who is expected to maintain certain relationships with other professional staff members, parents and the community.

**Types of Evaluations.** Districts reported the use of many different types of evaluations: checklists; rating scales; plan, teach, observe cycles; self-appraisal; peer group evaluation; student evaluation; self-designed evaluation; and evaluation based on student outcomes.

The number of items that teachers are evaluated on may be limited to a dozen or so or may exceed 100. A Pennsylvania district, for example, includes 146 items in four categories (personality, preparation, technique and pupil reaction), while an Oregon district details 80 standards in 11 categories.

The rating scale may be loose and open ("please rate teachers from 0 to 10") — consequently, not of much use in dismissal cases — or it may define precisely what is meant by terms such as "satisfactory," "marginal," "needs improvement" and "outstanding."

### Don't Bargain on Evaluation

Evaluation expert George Redfern advises districts that teacher evaluation should *not* be made part of a collective bargaining agreement. He recommends that districts with it in their contracts trade it for something else that teachers want. Paul Salmon, AASA executive director, agrees that evaluation should not be subject to collective bargaining because it's a management function.

**Another caution:** Districts must learn to distinguish between negotiable and non-negotiable items. As an example, Richard Manatt said Iowa's fair dismissal legislation requires boards to "establish evaluation criteria and implement evaluation procedures" and to negotiate evaluation procedures in good faith with an exclusive bargaining representative, if one has been certified. That means management has the right to establish the *criteria* or *standards* used to evaluate employees, and employees *may* have the right to negotiate the *procedure* or *manner* by which management's evaluation is accomplished.

To further clarify the difference, Manatt lists the following as non-negotiable items:

- The philosophy and objectives of evaluation, including the method of instruction or approach to be used, such as individualized instruction, "back to basics," discovery/inquiry.
- Performance areas and criteria, such as teaching techniques and classroom management.
- Evaluation forms and the evaluation instrument itself.
- Changes in the evaluation criteria.

The operational procedures, which may be considered negotiable items, could include provisions such as who is to serve as evaluators, the length of the evaluation cycle, details on observations and conferences and what means of assistance would be provided to teachers needing improvement.

While Manatt's advice applies specifically to Iowa districts, it should alert administrators and boards of education to the necessity of obtaining legal advice when they are uncertain of the legal implications of negotiating evaluation criteria and procedures.

**Prospects:** Boards of education and administrators can expect harder bargaining on evaluation, grievances and organizational security, rather than dollars, said Myron Lieberman, in an interview for this report. Lieberman, a consultant on negotiations from Beverly Hills, Calif., said the shift in negotiations priorities is resulting from an oversupply of teachers and district budget troubles.

A 1977 survey by the National School Boards Assocation confirms Lieberman's conclusions. Respondents to the survey said the most common provision that unions wanted in collective bargaining agreements was a check-off system for collecting dues from teachers' salaries, followed by provisions covering teacher evaluation procedures.

## What Districts Are Doing

The following examples, drawn from responses to the **Critical Issues** survey, were chosen for specific purposes. They show how evaluation may serve the dual purpose of improving instruction and making management decisions. Note, too, the types of efforts under way to make evaluations more precise and their meanings clearer.

**Evaluation by objectives** is used by the Prince William County Public Schools, Manassas, Va. The system, set up with the help of evaluation expert George Redfern, was established cooperatively by administrators and teachers nominated by the Prince William Education Association.

Although the primary purpose of the evaluation program is "to promote improvement and professional growth," included among the specific objectives are these purposes: "to define the dimensions of deficiency, when circumstances require, so that they will conform to the requirements of due process"; and "to evaluate performance in terms of duties for which the individual can realistically and reasonably be held accountable."

The Prince William program includes six steps:

1. Establishment of performance standards (job descriptions for each teacher).
2. Diagnosis of the status of current performance. (How well is the teacher meeting the standards?)
3. Selection of a small number of specific objectives to be accomplished within a specific amount of time by each teacher.
4. Development of "action plans." (How will the teacher accomplish the specific objectives in step 3?)
5. Assessment (evaluation) of each teacher's performance on specific objectives and 10 general performance standards used by the district. Three ratings are used: exceeded expectations, met expectations and results below expectations. For any area marked "results below expectations," both the teacher and the evaluator must state a reason. Evaluators are also required to include recommendations for improvement.
6. Analysis of results; plan for the future. During the "culminating conference" in the evaluation cycle, both teacher and evaluator try to reach consensus on how well the teacher met specific objectives. The district notes in its guide on evaluation that teachers should know of unsatisfactory work long before the culminating conference. "There should be no suprises." The evaluator must provide back-up material attesting to unsatisfactory performance prior to and during the conference.

The district allows for an "adjustment" (appeal) process if the teacher feels that the evaluation is incomplete or unjust.

**A team evaluation procedure** is used by the Columbia County School District No. 13, Rainier, Ore., under certain circumstances. It may be requested by a building principal. Or it can be used if the board of education shows concern about a teacher's instructional abilities, if the administrative team shows concern about a staff member, or if the superintendent or an instructor requests it. A team of three evaluators is appointed by the superintendent. If team members do not agree on a final recommendation following an evaluation, the superintendent serves as referee to the group.

**A "clinical supervisory process"** supplements the annual teacher evaluation form in the 3,000-student district of the North Shore Schools, Sea Cliffs, N.Y. In brief, it requires a teacher and supervisor to jointly agree prior to every classroom observation what is to be accomplished in a lesson and how such accomplishment is to be measured. The lesson is observed and a follow-up conference is held to determine whether the objectives of the lesson were met. "There is no doubt in my mind," says Supt. Christopher J. Warrell, "that the clinical supervisory process is the most successful way of revealing incompetency and of providing an objective basis for always unpleasant dismissals."

## Efforts To Make Evaluations Clearer, More Meaningful

**Ratings in four categories.** Rather than using numbers or letters for rating teachers, the Talmadge (Ohio) City Schools recommends rating teachers in four categories: minor improvements suggested (this would be the category for outstanding, superior, master teacher or expert); improvement recommended (for a teacher that is good, competent, capable, helpful, satisfactory or effective); significant improvement required (for teachers with unsatisfactory ratings, but with improvement possible); and category IV, nonrenewal recommended. The district rates teachers on personal qualities, teaching performance, professional qualities and job target.

Two sample evaluation criteria used by the district follow:

Category: Personal Qualities
Subcategory: Grammar
Criteria: Uses exceptional grammar and vocabulary at all times.
Uses adequate grammar and vocabulary most of the time.
Uses poor grammar frequently.

Category: Teaching Performance
Subcategory: Pupil Growth
Criteria: Continuous provision for evaluating teaching-learning process, with student participation in evaluation. Supplements conventional testing and testing data.
Irregular provision for evaluating teaching-learning process; uses conventional testing and testing data.
Little provision for evaluation of the teaching-learning process. Little regard for formal and informal testing and testing data.

## How Baltimore Evaluates Teachers

The 160,000-student Baltimore City Public Schools base teacher evaluation on performance criteria in 11 areas and indicators of quality performance. To illustrate: The instructional criteria, "Demonstrates proficiency in the use of English," includes three indicators of quality:

a. Serves as a model for students by observing the conventions of oral standard English.
b. Employs the appropriate conventions of edited standard English in all written work.
c. Communicates with reasonable clarity, conciseness and precision in both speaking and writing.

The summary evaluation form requires administrators to rate teachers on a scale of "unsatisfactory," "needs improvement," "satisfactory," "good," or "superior."

Note that the form allows for comments and also contains additional guidelines for administrators to use in giving the teacher an overall evaluation.

Date ______________________
mo/day/yr

| *PERFORMANCE CRITERIA* | *Unsatisfactory (U)* | *Needs Improvement (NI)* | *Satisfactory (S)* | *Good (G)* | *Superior (SU)* | *COMMENTS* |
|---|---|---|---|---|---|---|
| 1. Demonstrates proficiency in the use of English | | | | | | |
| 2. Demonstrates competence in the subject field(s) | | | | | | |
| 3. Appraises student learning levels, interests and needs | | | | | | |
| 4. Establishes learning objectives and plans instruction consistent with appraisal of individual student needs and requirements of curriculum framework | | | | | | |
| 5. Uses effective instructional methods | | | | | | |
| 6. Uses effective instructional resources | | | | | | |
| 7. Keeps an accurate, systematic, ongoing record of student achievement | | | | | | |
| 8. Establishes and maintains effective classroom discipline and management procedures | | | | | | |
| 9. Appraises the effectiveness of one's own instructional program and methods | | | | | | |
| 10. Performs non-instructional functions necessary to the total school program | | | | | | |
| 11. Meets accepted standards of professional behavior | | | | | | |
| TOTALS | | | | | | |

Overall Evaluation ______________________

*GUIDELINES FOR 1-11*

3 or more U .................... U
6 or more U or NI .............. U
1 or 2 U ....................... NI
4 or 5 NI ...................... NI
No U's, more than 3 NI ........ S
6 G, remainder S .............. G
8 SU, remainder S or G ....... SU

**'Sample evidence' indicates district standards.** The Flushing (Mich.) Community Schools evaluate teachers in five general areas: instructional competence, classroom management, contribution to school and community, professional growth and personal characteristics. They are rated on a continuum ranging from "not acceptable" to "acceptable." Within the latter category, the range extends from "needs improvement" to "outstanding."

The evaluation form contains a general statement of the district's standard as well as sample evidence for each subcategory within the five general areas. Here's an illustration:

General Area: Instructional Competence
Subcategory: Objectives
General Standard: The teacher has certain specific objectives to be achieved each day.
Sample Evidences: Objectives are stated in plan book.
Teacher makes the purpose of the lesson clear at the start of the period.
Students encouraged to express their needs and expectations.
Students and teacher review day's activities to determine if objectives have been accomplished.
Near the end of the lesson, the teacher summarizes the main point and helps students see the importance of what they have learned.

**The Seattle Public Schools,** on the other hand, list "minimum criteria" for certificated teachers. Following are two sample criteria:

**Classroom management:** The certificated classroom teacher demonstrates in his or her performance a competent level of knowledge and skill in organizing the physical and human elements in the educational setting.

**Instructional skill.** The teacher demonstrates in his or her performance a competent level of knowledge and skill in designing and conducting an instructional experience.

Sample Minimum Criteria
For Certificated Classroom Teachers
Seattle Public Schools

| | Yes | No | N.A. | What Were the Indicators? |
|---|---|---|---|---|
| Is there a perceivable objective for this lesson or assignment? | | | | |
| Is the pace of the lesson too rapid or too slow for the students? | | | | |
| Do students know and use cooperatively developed classroom standards of conduct? | | | | |
| Is there evidence that the teacher is making appropriate use of student services, e.g., counselors, social workers, resource teachers, remedial helpers? | | | | |
| Are there indications that learning progress and achievement are being recorded? | | | | |
| Are meaningful records of progress available to students, parents and other professionals? | | | | |
| Does the teacher effectively resolve issues with students, parents or colleagues? | | | | |
| Does the teacher maintain a positive classroom climate? | | | | |
| Is the teacher willing to undertake a task when asked? | | | | |

In addition, the district lists "minimum acceptable performance criteria" for certificated classroom teachers in checklist form. The checklist is used by principals in observing and evaluating teachers. The evaluator answers "yes," "no," or "not applicable" to indicate if the teacher under observation meets the minimum criteria. The evaluator also must state anecdotal comments or "indicators" to back up the yes/no answers. The entire checklist, including the anecdotal statements, provides concrete data upon which a narrative statement can be based. (See the box containing samples of the minimum criteria used by the Seattle district. The entire checklist is contained in *The Seattle Plan: Evaluation, Probation and Nonrenewal of Certificated Teachers*. Seattle Public Schools, 815 Fourth Ave., N., Seattle, Wash. 98109; 33pp.; $2).

### *A Plan To Assist or Dismiss Can Work*

## Case Study: Oak Ridge, Tenn.

At mid-year, principals in the Oak Ridge (Tenn.) Schools report the name of any staff member who is having difficulty sufficient enough to warrant a decision not to renew a contract. Once a teacher in difficulty is identified, the "formative" part of the evaluation program is initiated. It consists of intensive help provide by the principal and the assistant superintendent for curriculum and instruction. In many cases, a third party, usually an instructional specialist from the district or a university professor or other outside expert, observes the teacher, collects objective data, sets standards for improvement and monitors the improvement effort.

Only about 15 percent of the teachers need additional assistance. When that happens, the "summative" component of the evaluation program is put into effect. The principal confers with the teacher, then both the principal and assistant superintendent observe the teacher's work more carefully. Poor practices are objectively documented, and data collected during the observations are shared with the teacher. When it becomes clear that dismissal is imminent, the school attorney is brought into the case.

According to Supt. Kenneth H. Loflin, it takes about two years to build a strong, well documented case against a tenured teacher. He states further: "The feeling that you can't dismiss a tenured teacher is really a myth. If you're willing to put forth the time and effort, you can. We've dealt with several tenured teachers in this area in the past few years."

During the seven years the plan has been in use, none of the district's dismissal cases has gone to court. Once the carefully documented case is discussed with the teacher having difficulty, the person usually submits a resignation or retires.

Procedures for improvement and dismissal are based on the district's evaluation document, *The Oak Ridge Plan for Improving Performance Through Evaluation and Staff Development*. It contains 98 criteria used for assessing teacher effectiveness in 11 categories, including: knowledge and understanding of the learner, competency in subject area, evaluation of the instructional program and student progress, and professional responsibilities.

During September and October, each teacher being evaluated reviews the criteria and assesses his strong characteristics, satisfactory areas and those needing improvement. The principal rates the teacher using the same procedure. After discussing each other's evaluation of the teacher, they agree on the improvement objectives. In spring, the objectives are reviewed, and the two-part improvement/dismissal plan is triggered for teachers who do not satisfy the improvement objectives. Loflin states that Oak Ridge succeeds in improving substandard teachers about one-half of the time. The evaluation plan permits the district to freeze a teacher's salary in cases which do not merit immediate dismissal.

Loflin said he prefers using a third party in carrying out the plan because it helps provide a stronger dismissal case and reduces the chances of bias being charged. Another reason for the district's success in dismissal cases, he says, is the early use of legal help.

**For more information,** contact Kenneth H. Loflin, Superintendent, Oak Ridge Schools, P.O. Box Q, Oak Ridge, Tenn. 37830.

### *Keep Improvement, Rating Program Separate*

## Case Study: San Antonio, Tex.

Programs for rating teachers and for improving them must be kept separate, believes Ivan W. Fitzwater, superintendent of the North East Independent School District, San Antonio, Tex.

"I think evaluation and rating are absolutely incompatible," he says. "They have different psychological bases. If you have a single program, you are not doing the job for growth." An improvement program must present no threat to a teacher and probably is best provided by the teacher's peers, he believes.

North East Independent uses these separate approaches:

1. *Accountability:* Goals are set in the fall by each teacher (in conference with the principal) after a review of the type of pupils in the teacher's class, the kind of facilities available and other resources at hand. Usually, goals are set by consensus but, in case of disagreement, the principal's view prevails. Principal and teacher meet twice more before spring to check progress toward the goals.

Before April 1, a culminating conference is held. "If goals have been reached," says Fitzwater, "it's just a pleasant time to review the progress." If not, the system will show a great discrepancy between what the teacher and principal feel has been done that year. A probationary teacher not meeting goals is terminated. A tenured teacher is placed on probation during the next school year, with dismissal the result if the teacher doesn't show improvement that year.

2. *Peer evaluation:* In a new program under way at North East Independent, principals are forming peer evalua-

tion clusters of teachers in their schools. These teacher discussion groups are voluntary, and a school may have more than one, depending on its size. Teachers in the clusters discuss their instructional progress and review how well the school and district are moving toward their goals. They share techniques, concerns and personal teaching standards.

These peer groups, says Fitzwater, thus informally formulate a common faculty view of accepted standards of competence. This information is needed by substandard teachers both to help them see their shortcomings and to provide peer pressure to do better. The groups also show that peer assistance is available in one's own school. "It's usually far more likely that someone doing the same job will be of help," notes Fitzwater.

He thinks the chances of an incompetent teacher being improved depend on three things: the help available, the teacher's own motivation and the local legal system. A teacher association bent on resisting evaluation-improvement programs can simply prevent any help from being given, he feels.

Another variable is the determination of administrators. Fitzwater thinks the legal process can dissuade any but the most dedicated administrator from taking action. But, he says, "I've found that the judges lean toward protecting the kids — they go with the evidence pretty well. But you've got to have the guts to do something about it." In recent years, North East Independent's decision to dismiss has always been sustained.

A superintendent needs to put everything else in the back seat, compared with providing good instruction for the children, he believes. "If you take that standpoint," he said, "all else falls into line. And with that, there's no way you can justify keeping an incompetent teacher or principal. It just doesn't fit."

A large photograph of 75 or 80 schoolchildren hangs on the wall of the North East Independent board meeting room. "Every once in a while," says Fitzwater, "I just turn around and look at the picture, and everyone knows what I'm thinking."

**For more information,** contact Ivan W. Fitzwater, Superintendent, North East Independent School District, 10333 Broadway, San Antonio, Tex. 78286.

### *Improve the Evaluators*

## Case Study: Penn-Harris-Madison

To a great extent, an evaluation program rides on the abilities of its evaluators, believes Supt. A. Dean Speicher of the Penn-Harris-Madison School Corp., Osceola, Ind. The 7,000-student district has concentrated during the last five years on developing principals' skills in the essentials of evaluation: goal-setting, classroom observation and clinical supervision skills.

"Any kind of supervisory job involving evaluation is a subjective one," says Speicher. "The responsibility of the school district is to train people to be objective in their subjective judgments."

Writing performance objectives that work was first on P-H-M's agenda five years ago when the current improvement program began. Writing workshops were led by local administrators skilled in this area, and the district sponsored seminars by outside authorities. A trade brought a Tennessee superintendent into the district for training sessions, in exchange for Speicher's services in Tennessee.

Joining with neighboring districts, P-H-M won a federal grant under Title IV-C of the Elementary and Secondary Education Act on setting local standards of performance. Two local administrators attend out-of-district training sessions, then teach their new skills to other administrators through a "cadre" system.

Better observation is the goal in using a series of videotape sessions for principals. P-H-M's principals do a better job of observation by not trying to see all aspects of a teacher's performance during each visit. Instead, they concentrate each year only on certain aspects of the total teaching act, says Speicher. Over a period of several years, the whole of the teacher's performance is finally observed.

A problem that troubles P-H-M is the limited time principals usually have for observation. Consultants have counseled principals on techniques of time management, and the district has set up a central word-processing center to handle work from all its 14 schools. The center, giving 24-hour turnaround time on school work, lets principals and their secretaries devote more time to instructional and building management.

P-H-M uses an evaluation/improvement/dismissal program for all of its employees, including administrators and non-teaching staff. Procedures for both evaluation and dismissal are blended together in its policies, but with an emphasis on each employee knowing: what the district expects, what help is available and the consequences of not meeting standards.

Speicher said the district strictly limits the number of goals attempted each year by a school or a teacher. "You have to decide whether you are more interested in quantity or quality," he said. "We're interested in quality."

During the first year of goal-setting, 15 districtwide goals were adopted, and 12 of them met. The effort those 12 took, however, convinced administrators that fewer goals would provide better results. Now, after districtwide goals are set, each schools picks from one to four compatible objectives for its staff. Based on these, each teacher sets one to three goals after consultation with the principal.

The teacher and principal meet again three more times during the year to check progress toward the goals. Any time serious problems develop — either in meeting goals or in some kind of unprofessional conduct — the principal puts the district's "summative" evaluation process into effect.

This leads to intensive help for the teacher, as well as strict observation of its effect on the teacher's work. It ends either with improvement by the teacher or with the district moving for dismissal. Summative evaluation begins with a teacher-principal conference and written report on exactly what problems exist and what must be done about them. One to two years is given for improvement, with the principal, central office staff and outside experts joining to help the teacher.

At the end of that time, says Speicher, if there hasn't been sufficient improvement, if the district has done all it can and if adequate documentation has been collected, the district moves for termination.

In the last five years, due process dismissal proceedings have been started against 9 P-H-M teachers. Most resigned before the first hearing.

**For more information,** contact A. Dean Speicher, Superintendent, Penn-Harris-Madison School Corp., Box 302, Osceola, Ind. 46561.

CHAPTER IV

# A Primer on Due Process:

## Legal Safeguards

To be successful in separating teachers from their jobs, school boards and administrators must have an understanding of due process requirements. In general, due process is satisfied when administrators and boards invoke the principles of fair play and when they are reasonable, just and not arbitrary or capricious.

That sounds rather straightforward, but the first problem is determining what process is due. For one thing the courts have refused to formulate an absolute definition of due process. Instead, due process is described as "developing by the gradual process of judicial inclusion."

## Guidance from the Supreme Court

Despite the absence of a firm definition, much guidance is available on what due process requires. In a 1951 case, for example, U.S. Supreme Court Justice Felix Frankfurter said: "Fairness of procedure is due process in the primary sense . . . ."

"Due process cannot be imprisoned within the treacherous limits of any formula," Frankfurter said. "Due process is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment . . . . the precise nature of the interest that has been adversely affected, the manner in which this was done and the reasons for doing it, the available alternatives to the procedure implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the judicial judgment."

## Two Kinds of Due Process

School administrators must be concerned with two kinds of due process in terminating teachers:

- **Procedural due process,** which refers to the procedures and methods used to carry out regulations. Generally, procedural due process can be thought of as an individual's right to notice and a hearing.
- **Substantive due process,** which refers to the fairness of the law or regulation. The extent and definition of substantive due process are based largely on the due process clause of the 14th Amendment to the U.S. Constitution and on comparable provisions in state constitutions.

The authority of local school boards to hire and fire carries with it the obligation to do so in accordance with due process requirements. Simply put, if a school system proposes either to dismiss a teacher or to nonrenew a teacher's contract, the teacher may possess some rights to notice and a hearing before the action takes effect.

Even without such rights, the teacher may be able to challenge the board's action on the basis that it violated one of the teacher's Constitutional rights.

## Where Are Due Process Rights Found?

Thomas Flygare notes in *The Legal Rights of Teachers* (Phi Delta Kappa, Eight and Union, Box 789, Bloomington, Ind. 47401; 75¢) that the procedural rights a teacher has before or shortly after termination may be found in:

- **The teacher's contract.**
- **State law or regulations of the state board of education.**
- **Court rulings construing the U.S. Constitution.**

In addition, Maine's Hugh G.E. MacMahon advises school districts with collective bargaining agreements to carefully review them for any provisions dealing with nonrenewal of probationary teachers. He says such provisions could require a district not only to notify the teachers of the nonrenewal in accordance with a specific deadline but also to notify the union. Additional rights granted to the employee under such an agreement could include the right to a statement of reasons, a hearing and the use of specified evaluation procedures.

MacMahon advises districts not to include "just cause" clauses in contracts regarding probationary teachers because they could oblige the district to engage in time consuming and expensive litigation, and they could lead to an expectancy of reemployment on the part of the probationary teacher.

A district must follow procedural due process in teacher dismissal or nonrenewal according to the following guidelines:

- Generally, a tenured teacher is entitled to due process for either dismissal or nonrenewal at the end of the year, while a nontenured teacher is entitled to due process only for dismissal, not for nonrenewal. (Check specific state statutes.)
- Dismissal during the term of a contract — for either a tenured or nontenured teacher — requires that due process procedures be followed.
- In a nonrenewal, a nontenured teacher generally has no "property" interest and no "liberty" interest, unless the state statute or the board creates one. One attorney advises: Unless required to do so by state statute or regulation, boards should not give a reason for nonrenewal. The rule to follow is to use a one-liner. "Your contract will not be renewed."
- Due process procedures must be *consistently* applied and administered.

## What Process Is Due?

How can administrators and boards of education tell what process is due an employee?

The touchstone case for helping districts decide when procedural due process is required is *Roth v. Board of Regents*, decided by the U.S. Supreme Court in 1972. In Roth, the question presented to the court was whether David Roth, a nontenured assistant professor of political science at Wisconsin State University, Oshkosh, had a constitutional right to a statement of reasons and a hearing based on the university's decision not to rehire him for another year. Roth argued that simple nonretention damages a teacher's reputation so badly that he has a Constitutional right to a hearing to clear his name.

The Supreme Court said procedural due process requirements would apply only if the teacher had been deprived of "liberty" or "property." The court emphasized that "property" rights are not created by the Constitution but are derived from an independent source, such as state law. There were no state statutes or university rules or policies securing for the teacher an interest or legitimate claim to reemployment. Roth's appointment to a one-year term specifically provided that employment would terminate on June 30 with no provision for renewal. Thus, Roth did not have the kind of property right that tenured teachers have under state tenure laws.

With regard to "liberty" rights, the court said the board did not make any charge against Roth that "might seriously damage his standing and associations in his community." (An example would be a charge that he had been guilty of dishonesty or immorality. Such a charge would require that a hearing be held *so that the teacher could clear his name,* not to show that he should be reemployed.)

The court said further that no stigma had been imposed on the teacher that foreclosed his freedom or "liberty" to take advantage of other employment opportunities.

A second case decided by the U.S. Supreme Court in 1972, *Perry v. Sindermann,* also involved a nontenured professor at the junior college level. Sindermann sought damages and reinstatement following nonrenewal after 10 years in the state college system, the last four under a series of one-year written contracts. The college regents, without giving him an explanation or prior hearing, declined to renew his employment.

Like Roth, Sindermann claimed nonrenewal was due to his exercise of a Constitutional right. The Supreme Court did not go into the substantive claims in either case, but based its rulings on procedural due process requirements. Regarding the Sindermann case, the court said that although no tenure statute existed in the state, an employee might acquire a "property" interest in reemployment through an "implied" contract. In other words, Sindermann would be entitled to the protection of procedural due process if the college had a de facto tenure program and the professor had tenure under that program.

What do the two cases imply for school districts? First, it appears that six factors would entitle a teacher to a hearing before termination:

- Tenure.
- A contract for a period of years or even one year if termination is contemplated before the end of it.
- An implied promise of continued employment.
- "An objective expectancy" of reemployment.
- Nonrenewal based on a reason that would damage the teacher's standing or associations within the community or injure his reputation.
- A situation where a stigma would be created which might tend to foreclose the teacher's freedom to take advantage of other teaching opportunities.

The first four factors would be classified as property interests; the latter two, as liberty interests.

In commenting on the cases, E. Edmund Reutter Jr., professor of education at Teachers College, Columbia University, pointed out some further implications for administrators. "It is legally crucial for administrators to see to it that nothing is said which could be construed to damage the nonretained teacher's character, nor to impair his getting another position. It would seem perilous," Reutter continued, "to discuss with parents, students, press or teacher association representatives why a teacher is not rehired. Anything said that would damage a teacher's good name would warrant a hearing, but not a rehiring."

Duke University's Betsy Levin points out that even when dismissal is based on charges suggesting serious character defects, the charges do not have to be made public. In one case, for example, a teacher was nonrenewed and the reasons were kept confidential. The court said the nonrenewal did not deprive the teacher of an interest in liberty, because her future employment opportunities were not affected. In another case involving the dismissal of a teacher for inability to maintain classroom control, the court held that dismissal did not deprive the teacher of a liberty interest in his personal or professional reputation because there were no suggestions of dishonesty or immorality in the discharge. Although the reasons for the discharge were known to the students and school personnel, the school board did not publicize them.

Levin observes that suggestions of dishonesty or immorality would be treated seriously and perhaps entitle a teacher to a hearing, but charges of personality differences or difficulty in getting along with others are not the kinds of accusations which would warrant a hearing based on violation of a teacher's liberty.

Mid-year termination, however, may pose different problems. In one case, a mid-year dismissal for incompetence was held to sufficiently stigmatize a nontenured teacher that he was entitled to a hearing based on deprivation of liberty. The court also said that a property interest was involved, since the discharge occurred during the term of the teacher's contract.

## A Close-Up of Due Process

Due process generally is thought of as requiring notice and a hearing. When looked at more closely, however, there are 10 aspects of due process. Not all of them apply in every case involving a school employee. Instead, the amount and type of due process that must be accorded an employee depends on the employee's status, state requirements and the nuance of the case. To illustrate: the level of due process changes dramatically when a teacher's livelihood is at issue.

School administrators and board members should be acquainted with all 10 aspects of due process. They are:

1. Notice.
2. Right to counsel.
3. Judgment by an impartial tribunal.
4. Right to avoid self-incrimination.
5. Presentation of evidence.
6. Right to cross-examination.
7. Right to have witnesses.
8. Proof of guilt.
9. Record of the hearing.
10. Right of appeal.

Several of these aspects of due process present particular problems in staff terminations. An examination follows.

## Notice

To satisfy the due process requirements of notice, a district must do more than serve notice of termination or nonrenewal within the time allowances specified in state statutes. Rather, giving notice is best described as an ever-present obligation of school districts to inform teachers of rules and regulations and the penalties for noncompliance. Notice also requires that individual teachers be informed of specific infractions of rules and of their due process rights when violation of rules is charged. In some states, moreover, teachers are entitled to a prior written notice before a dismissal notice is valid.

In the eyes of the courts, perhaps the No. 1 rule in the due process game is, "Don't hide the ball." Supreme Court

### Quick Tips

- ✓ Courts presume a property right in mid-year dismissals. Due process is required.
- ✓ Generally, probationary teachers may be nonrenewed for no cause or for cause. But they cannot be nonrenewed for bad cause, such as exercising a fundamental right. If that happens, a teacher's dismissal will not stand.
- ✓ Courts may impose punitive measures (e.g., suspension without pay, fines) rather than upholding a dismissal, when dismissal is considered too severe an action.
- ✓ Districts can impose punitive measures, so long as their actions do not conflict with state law or when state law is silent on the subject.
- ✓ Some state statutes allow suspension of a teacher before a hearing in some circumstances. In some cases, moreover, the government's interest in protecting students has been found to outweigh the teacher's right to a hearing prior to suspension.

Justice Felix Frankfurter noted that "the appearance of due process is every bit as important as the due process itself." To give the appearance of due process regarding notice, school districts are advised to:

- Publish and make available to every employee an up-to-date version of school rules and regulations.
- Display in a prominent place, preferably in a glass case under lock and key, the district's list of rules and regulations.
- Review annually with employees, individually if necessary, district rules and regulations. Some districts require principals to hold individual face-to-face conferences with teachers to go over what is expected of them in the classroom.
- Let a teacher know about a problem in unequivocal terms as soon as it is discovered.
- Give all help possible to correct the unacceptable conduct.
- Allow a reasonable time for the correction to take place.

**State statute dictates substance.** State statute or district regulations usually dictate exactly what must be contained in a formal notice of termination or nonrenewal of a teacher's contract. Most state statutes establish deadlines for notification of nonrenewal or dismissal. They must be formally observed. So must requirements for delivery of notice.

For proper preparation of notice, substance is more important than form. When incompetence is charged, for example, school legal experts advise that the reasons generally need not be prepared with the formality necessary in indictment. They are sufficient if they are made in simple language and fairly advise the employee so that a proper defense may be prepared.

**Pitfall: Noncompliance with district procedure.** In a New York case, a probationary teacher was given an unsatisfactory rating. But the school board failed to follow the procedure it set up for giving notice, so the court held that the rating had to be withdrawn. In another case, a tenured teacher was given notice that her teaching performance was unsatisfactory. But the notice failed to comply with the board's bylaws, one of which stated that the teacher was to be told of her rights at the same time the notice was presented. The notice was declared defective.

**Pitfall: Improper delivery procedure.** In a Michigan case, a written notice of dismissal was sent by registered mail (as required by law) on the last day it could be delivered. The teacher was not at home when the notice was delivered, so the postal employee left a mail arrival notice in the teacher's mailbox. The principal also told the teacher orally of the intended dismissal. The dismissal was not upheld, however, because neither the oral notification nor the postman's attempted delivery satisfied the statutory requirement of delivery of written notice.

**Pitfall: Noncompliance with dates.** In one case, a notice of termination was held to be insufficient when two probationary teachers received written notice 59 days before the end of the school year, instead of the 60 days specified in state statute. In another case, dismissal notices were mailed to three teachers on the last date the teachers could be legally notified. One teacher received his notice the next day, a second teacher received his letter three days after it was mailed and the third letter was never delivered. In invalidating the dismissals, the court said: "In the absence of custom, statute or express contract, a notice sought to be served by mail is not effective until it comes into the hands of the one for whom it is intended."

Courts are predisposed toward interpreting the laws regarding dismissals in a literal manner. Therefore, districts have little room for error. The dismissal process should be initiated soon enough to avoid any last minute problems.

**Employees have obligations, too.** Employees cannot make themselves conveniently unavailable to receive notice of termination or nonrenewal. In one case, for example, a letter was sent by certified mail notifying a principal that he had 30 days in which to request a hearing following a vote by the school board to dismiss him. When no one was home to receive the letter, the post office followed its normal procedure of leaving a notice, holding the letter and delivering a second notice five days later. The principal claimed he did not receive a notice. The court rejected his claim, however, holding that service by registered or certified mail is adequate to provide notice. It found substantial evidence to support the trial court's finding that the principal willfully disregarded the notice.

The same kind of reasoning prevailed in an Idaho case, in which a teacher walked out of his discharge hearing without listening to a presentation of the evidence or without asking a single question. After he left, the board decided that a full hearing was not necessary, and it proceeded to dismiss him on the basis of "known facts and circumstances." An opinion upheld by the Idaho Supreme Court said, "A teacher can waive his right to a hearing by requesting one but subsequently refusing to participate. What the Constitution does require is 'an opportunity' for a hearing. Ferguson [the teacher] was granted such an opportunity."

**What to watch for in contracts.** Representatives of teachers unions are demanding that teachers have the right to know *immediately* of any performance considered deficient and the facts upon which the judgment is based. Further, they advise local bargaining units to obtain a clause obliging administrators to withhold from teachers' personnel files any derogatory material, whether gleaned in formal observation or by other means, until teachers have had a chance to review it. The National Education Association also suggests that local units obtain clauses which obligate administrators to make teachers aware of any complaint against them by any parent, student or other person "which may be used in any manner of evaluating a teacher."

## Judgment by an Impartial Tribunal

A hot legal topic of the future and a due process concern now is the neutrality of the hearing officer or panel in deciding a case when protected rights are at stake or statutory privileges are to be denied. That prediction was made by Edgar H. Bittle, general counsel for the Iowa Association of School Boards. He is joined by other attorneys, some of whom predict that schools boards soon may have to use two attorneys: one to represent the administration and one to represent the board.

Bittle advises that board members will most likely be immune from attack on grounds of partiality or bias if they insulate decision making from adversary functions (e.g., prosecution and investigation). "The separation of functions may well be essential, and boards should be carefully advised to assign persons other than board members the task of investigating and prosecuting," he says. As alternatives, he suggests the use of ad hoc committees and the assignment of investigation and prosecution to administrators.

Another alternative could be provision for a hearing officer prior to board action. (Some state statutes already require this step.) The duties of the hearing officer would be to make a record and findings along with a recommendation to the board, which it would review and act upon. Bittle advises districts considering the use of a hearing officer, in the absence of a specific state statute, to carefully review state law. The practice might be subject to challenge on the basis of unlawful delegation of power, he cautions.

**Preliminary inquiries:** How much can a board investigate a case prior to a formal hearing without violating a teacher's due process rights? Generally, board members must not investigate a case so thoroughly as to render the subsequent hearing superfluous. It is proper, however, for boards to conduct a limited preliminary inquiry to determine if there is real substance to a charge.

Once the board in its preliminary inquiry reaches the threshold of determining probable cause, further investigation and prosecution should be conducted by someone other than the board. The Colorado Supreme Court said in one case that the board "must do nothing in its preliminary inquiry that would serve to remove the appearance of fairness from its eventual determination." One attorney further advises that once a board has determined that charges are substantial enough to warrant dismissal procedures, it should set the time and place for a hearing but avoid further involvement until the hearing.

In states where the board alone initiates charges and conducts the hearing, that is, where state law does not provide for a separate hearing panel, an even higher standard of impartiality may be required, Bittle says. For example, decisions reached in several cases indicate that a school board attorney who takes part in a termination hearing in an adversary role — e.g., that of a prosecutor — should not take part in the board's private deliberations during the hearing. "The school attorney who has been involved in the investigation of the facts, the prosecution of the case, the making of objections or the writing of briefs," says Bittle, "should not accompany board members into executive session while they are deliberating whether to terminate a teacher." It is all right, he maintains, for the school attorney to go into the board room following the board's deliberations and decision to write up the findings of fact and conclusions of law.

Bittle suggests also that the board allow the teacher's counsel to view the findings and conclusions before they are adopted so that objections or exceptions may be made part of the hearing record. "This could preserve the fairness and due process requirements without unduly burdening the school district," he says.

**Advice on maintaining impartiality:** Any board member or panel member who doubts his ability to make an unbiased decision should disqualify himself. The same goes for any member who is a witness in a case or who has a direct interest in it. Lawyers also advise against the involvement of board or panel members in presenting a case against a teacher. Questions should be asked by the superintendent or other administrator or by counsel. After initial questioning, however, witnesses may be questioned by board or panel members.

**Outlook:** In some cases, teachers have claimed that they could not receive a fair hearing before a board that was judge, jury and prosecutor. But such claims generally have been rejected by the courts.

**Watch out for:** Attempts by teacher representatives to "voir dire" board members sitting as a hearing panel in termination proceedings, that is, to request a preliminary examination to determine competency. One Circuit Court, in rejecting such a request, pointed out that state legislation specifically vested the school board with the authority to conduct hearings and make decisions on contract termination. The court also noted that state statute provided for appeal from the school board's decision, implying that an examination of board members, if required, is more proper at the appeal level than at the time of the hearing.

## Evidence

Simply stated, due process requires that someone other than the person on trial has the burden of bringing evidence. In a job termination case, the burden ordinarily is on the school district. When the charge is incompetence, for example, it is up to the district to show by a preponderance of the evidence that the teacher is incompetent.

Legal experts offer these basic guidelines regarding evidence:

- It must be substantial.
- It must be relevant to establish the alleged facts.
- It must be developed in a Constitutionally approved way.
- It must be documented, which in its simplist form, means recording the time, date and place with witnesses listed, if any.
- Care should be taken not only to present all evidence at a hearing but to limit the evidence to the charges made.
- The rules of evidence applicable in court proceedings do not apply in a strict sense to dismissal hearings. However, hearings must be conducted in a fair manner.

**Evidence of incompetence:** Charges of professional incompetence usually must relate to the teacher's classroom performance. Legal scholars say, moreover, that incompetence generally assumes a recurring or continuous inability to do the job. When a school district can offer proper evidence that a teacher is incompetent, authorities say, the courts appear reluctant to second guess educators. In such a case, the court's interest is in assuring that all procedural safeguards have been met and that the action taken against the teacher is not arbitrary, capricious or an abuse of discretion.

Evidence of incompetence often is offered in the form of testimony from professionals, students and parents or community members. A 1944 case established that testimony as to the professional skill of teachers, when furnished by professional persons qualified to know, is generally acceptable as evidence.

In some cases, testimony from students has been used as evidence although less frequently than that of administrators and supervisors. Even less frequent, school legal experts say, is the testimony of fellow teachers and of community members.

The kinds of evidence used in various cases to indicate incompetence have included: a record of grades given students, a principal's daily notes documenting incidents, a letter from a director of personnel, a test prepared by a teacher, letters to a school board which demonstrated the teacher's lack of basic skills in the three R's, student test scores, evaluations showing consistently unsatisfactory performance and no improvement despite offers of help, and records of specific adverse behavior.

**Pitfall: Recency of the incidents.** The time period during which the evidence is gathered has a bearing on its relevance. Since incompetence is ordinarily not shown by an isolated act, the pattern of behavior necessary to show incompetence may extend over a substantial amount of time. The guideline to follow (in the absence of state statutory limitations) is reasonableness. Dismissal may not be supported if the evidence is unreasonably remote, timewise, from the dismissal. (Some state statutes specify a three-year limit for relevant evidence.)

To illlustrate: A tenured junior high school teacher was dismissed on charges of insubordination and conduct unbecoming a teacher, based on alleged incidents of physical abuse of students. One of the incidents had occurred three years earlier but had not been acted on. The court ordered reinstatement on the grounds that the record lacked substantial evidence to support any of the charges and that the three-year-old incident had taken place too long ago to be considered.

**Pitfall: Low-quality evidence.** In one case, a court ruled in favor of the teacher because she had not been individually warned to discontinue her "habitual tardiness" nor had she been notified that her records were being kept "incorrectly and in a careless and negligent manner." The teacher also was charged with failing to discharge her professional duties and responsibilities by procuring assistance in whole or in part from pupils in the grading of tests. The principal did not see the students placing grades on the paper, so his testimony was not deemed satisfactory proof of the charge. In the court's opinion, the quality of the evidence was not high enough to support dismissal.

Quality, rather than quantity of evidence seems to win out in helping districts to win cases. For example, a school board in New York seeking dismissal of a tenured teacher cited nine specific charges of incompetence to support the general charge. The court found substantial evidence to support the hearing panel's determination. It noted, however, that the court's review must be limited. It said it had no right to review the facts generally "as to the weight of evidence, beyond seeing to it that there is substantial evidence."

**Pitfall: The evidence must relate to the charges.** This fact was verified by the Michigan Court of Appeals when it ordered the reinstatement of a teacher. It said: "The result of the evidence was that the plaintiff was shown to be dedicated, to have different methods and that she did not get along with some of her students' parents and with the principal. What was not shown was that the plaintiff's methods injured her students mentally or physically in relation to their peers."

**Pitfall: Hearsay is not evidence.** A principal may hear from his vice principal or a department head that a teacher's performance is inadequate. He may wish to include that comment in his evaluative report for the teacher's file. But, warns the Oregon School Study Council, the comment is not admissible as evidence in a board hearing because it is considered "hearsay." Simply having the vice principal or department head testify to the charge will not solve the problem because neither person authored nor signed the evaluation report.

**Pitfall: Wording the charge.** A cause-and-effect statement used in a charge may be difficult to prove in a dismissal case. Take the statement: "The teacher is inefficient, resulting in pupil dropout." The evidence to support such a charge may be lacking, which would make it invalid.

Two cases, one won by a district and the other won by a teacher, illustrate the importance of correctly wording a charge. In both examples, the teacher was charged with "poor communication with students and other deficiencies." One teacher had 13 years' teaching experience; the other had taught for 15 years.

In the case won by the district, the charge was worded simply and clearly. More than 100 complaints were compiled and tallied, including 37 instances of "inability to maintain classroom control" and 31 instances of "no lesson plans." The appeals board judged that the teacher's communication with students was ineffective.

In the case of the teacher who won his appeal, the district made specific charges in cause and effect statements. It charged, for example, "ineffective communication with students resulting in low morale and high incidence of dropout" and "limited teaching technique resulting in lack of student motivation and interest." The appeals court could find no convincing substantive evidence that such acts or omissions had resulted in the effects the district charged.

## Cross Examination

Maine attorney Hugh G.E. MacMahon advises that if a district introduces only written documents at a hearing a teacher may claim that there was no opportunity to cross examine their author. Therefore, he says, written reports and evaluations should be part of the record, but oral testimony to explain or substantiate these documents also should be introduced.

## Proof of Guilt

In dismissal hearings as well as in regular civil lawsuits, the standard of proof is "a preponderance of the credible evidence." By comparison, the standard in criminal prosecutions is proof "beyond reasonable doubt."

To prevent districts from becoming overconfident by the thought of easy victories, a precautionary note is due. It takes hard evidence to dismiss a teacher for inefficiency or incompetence. "A district's big job," says school legal expert Chester Nolte, "is to overcome the presumption of competence." As an example of the kind of hard evidence required, Nolte suggests that districts might use "a frequency chart of how often certain acts are done by the teacher."

**Are evaluation reports sufficient for dismissal?** Nolte believes it is a toss-up as to whether a tenured teacher can be dismissed only on the basis of evaluation reports. He adds, however, that they can be used to show notice to the teacher and that every opportunity was given to the teacher to improve but that the defect did not disappear.

Don Moran, assistant executive director of the Kansas School Boards Association, believes evaluation reports are probably the poorest source for trying to dismiss a teacher. "The thing you are after is not in the evaluation reports," he says. Other experts believe, however, that the evaluation of a single principal, well documented and substantiated, can be adequate proof of incompetence. Moreover, evaluation systems now used by many school districts go beyond perfunctory questions about a teacher's voice and dress.

## Right of Appeal

Generally, teachers have the right to appeal a decision to a court of law. But first, administrative remedies must be exhausted. "Only where there is a strong showing that the administrative remedies are not adequate or that irreparable injury will result from the delay may the courts take jurisdiction prior to exhaustion of administrative remedies," concludes Duke University's Betsy Levin.

## Watch Out for Constitutional Violations

Teachers, both tenured and nontenured, have the same Constitutional rights as all other citizens. Generally, school districts cannot censure teachers, dismiss them or fail to renew their contracts based on the exercise of Constitutional rights.

When a teacher challenges school board action on the grounds that it involves unconstitutional infringement of his rights, the teacher bears the initial burden of establishing that the board's action was in fact based on impermissible reasons. Even if the teacher can do this, however, the school board may be able to show that infringement of the teacher's rights is justifiable under the Constitution. It's all a matter of balance and whether the state's interest outweighs that of the teacher.

Following is an examination of the Constitutional rights superintendents and boards are most apt to run into in job termination cases:

- Freedom of speech.
- Right of association.
- Right to privacy.

**Freedom of speech.** Of concern to superintendents and boards is the advice offered by Supreme Court Justice William Rehnquist in a January 1977 case. It makes clear that a teacher can be fired for certain conduct even if protected rights are involved. In the case, a nontenured Ohio teacher claimed that the board's refusal to renew his contract was an abridgement of his freedom of speech. Rehnquist said the fact that a teacher exercises free speech does not guarantee that his job will be protected.

Rehnquist came up with a two-part test to help courts and districts in similar cases. First, he said, it is up to the teacher to show that his free speech is a "substantial" or "motivating" factor in the board's decision not to rehire him. Secondly, the board must show that it has sufficient reason, other than the Constitutionally protected activity, to terminate the teacher.

In other words, a school board may consider a Constitutionally protected activity such as a free speech incident in its decision not to rehire a teacher. But, in order to assure that its decision is not overturned by the courts, it must be prepared to show that the teacher would not have been rehired in any event.

Other advice on restraint of a teacher's speech comes from Thomas Flygare. He says when a teacher claims that dismissal was based on exercising freedom of speech in the classroom, the courts will examine such facts as the age of the students exposed to the objectionable language. Age is an important factor, Flygare concludes, because it reflects the students' ability to accept the teacher's words for their "educational value rather than for their shock value."

In other challenges concerning First Amendment rights, courts have ruled that "community standards" may dictate the extent of the teacher's freedom of academic expression. In one case, a court said that a teacher did not have a Constitutional right to persist in a course of teaching that was contrary to the dictate of his employer.

**Right of association.** Generally, says Seattle's Gary M. Little, a teacher has the right to be active in any group he desires even though it may be one which the school board does not approve. Little notes two exceptions. School boards need not condone membership of a teacher in a subversive organization if the teacher has joined the group with the intent of furthering forceful overthrow of the government. Secondly, in rare instances, a school district may be able to prohibit active involvement in a group if the active membership is publicized and affects the ability of the teacher to teach or to get along with fellow staff members with whom a good relationship is necessary to fulfill the teacher's job responsibilities.

**Right to privacy.** Teachers like other citizens have a right to privacy. They have a right to conduct their private and sexual lives in any manner they see fit and cannot be dismissed for living in adultery or becoming drunk at home. However, warns Little, the same acts which a teacher can do without fear of reprisal in private may be cause for dismissal if done in public, provided that such public conduct can be shown to have an effect on the teacher's teaching ability. That could be interpreted to mean the teacher's ability to relate to students, to provide an appropriate role model for students or to function effectively with other staff members.

The employment rights of homosexuals are not clear, since the U.S. Supreme Court has refused to hear several cases. In the case of *Gaylord v. Tacoma School District*, decided in October 1977, the U.S. Supreme Court let stand a Washington State court ruling that teachers can be dismissed for being homosexuals. Gaylord was dismissed not for a particular homosexual act, but because he admitted his homosexual status to a school official upon questioning. The majority opinion of the state court warned that students "could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality."

**Note:** The U.S. Supreme Court's refusal to hear the case does not represent a ruling on its merits.

In the meantime, the rights of homosexual teachers have been upheld by some other state courts. In a California case, the state's Supreme Court appears to have discarded its previous assumption that public homosexual conduct alone establishes unfitness to teach.

There are reports of active professional organizations of homosexual teachers in some areas, and reports that 40 cities and counties in the United States have ordinances prohibiting employment discrimination against homosexuals.

## Improper Dismissal Costs $$

Reinstatement is one likely outcome of improper efforts to terminate teachers. Another outcome could be the awarding of damages against board members and administrators.

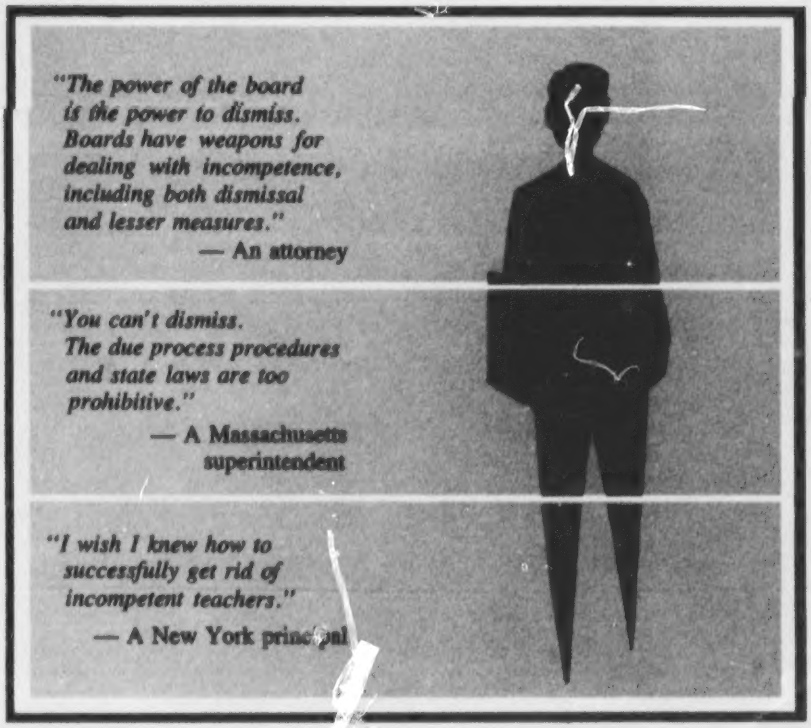
Prof. Floyd G. Delon of the University of Missouri explained in an AASA convention session how the awarding of damages might result. He cited an actual case in which three teachers were able to satisfy a jury that the board decided not to renew their contracts because of their activities in the Missouri National Education Association and their appearances in public meetings to raise questions concerning school board policies. The teachers were not given a hearing prior to dismissal.

The board's action was found to violate the teachers' Constitutional rights of free speech and association and due process.

The four board members were assessed a total of $7,500 plus $1,250 in attorney's fees. Fortunately, said Delon, such rulings are exceptions. "Hopefully, the reason is that school officials are acting properly in exercising control over teacher conduct," he concluded.

CHAPTER V

# Building a Dismissal Case



*"The power of the board is the power to dismiss. Boards have weapons for dealing with incompetence, including both dismissal and lesser measures."*
— An attorney

*"You can't dismiss. The due process procedures and state laws are too prohibitive."*
— A Massachusetts superintendent

*"I wish I knew how to successfully get rid of incompetent teachers."*
— A New York principal

The quotes illustrate the dilemma of school districts in trying to solve the problem of dismissing staff.

Lawyers say, "You can do it." Superintendents say, "Can you do it?" And principals, who must do it, say, "How?" The questions are legitimate because the law, if anything, favors the retention of teachers.

However, the National Organization on Legal Problems in Education in its 1976 *Yearbook on School Law* says unequivocally:

"Unless the school board has dismissed, transferred, demoted or disciplined its employees for Constitutionally impermissible reasons or has failed to provide the requisite procedural safeguards, it has proved difficult for employees to successfully challenge such actions."

Robert Crowe of Jacksonville, Ill., is one superintendent who believes that dismissing a tenured teacher "can be done." But, he notes, dismissing a person who has been a good teacher for many years but who is now slipping "takes a heck of a case."

Crowe is aware of the time, cost, bother and possible confrontation with a teachers union in trying to dismiss a teacher, but he maintains that the problem must be solved through improvement or dismissal.

Supt. Ivan Fitzwater of San Antonio says his district's decision to dismiss has always been sustained. "Frankly, we have built a pretty good case by the time that decision is made." He adds: "Many times I hear a superintendent say, 'they've got a lawyer.' Well, so do we. That's no reason to stop."

But many administrators do stop — for various reasons. Legal experts say administrators are often unclear about the way that courts view dismissal and may have had no experience in gathering pertinent evidence, presenting it or defending a point of view in a court of law. And, when the public relations and staff relations implications of making decisions on dismissal are added, inaction often is the result.

Other reasons for inaction include:

- The time and money involved in treading through myriad complex requirements.
- Inability of many districts to offer help to teachers found needing certain skills. In such situations, giving teachers bad ratings with no hope for remediation only creates morale problems.
- The general reluctance of any employer to discharge any employee. Says one observer: "Many relatively incompetent employees in government, private industry and school systems excite our sympathies — for example, the older employee with a fine record of past service, the marginal teacher who means well, works hard and has a large family."
- The presumption that teachers are competent when they are hired due to their training and certification by state authorities. The onus is entirely on the school board to prove otherwise when a teacher is to be dismissed for incompetence.

## How Districts Win Cases

Administrators responding to the **Critical Issues** survey for this report were asked to name the most successful means of dismissing a teacher whose performance is unsatisfactory. They said:

- "The most successful method is (1) documentation, (2) documentation and (3) documentation." — Illinois superintendent.
- "Document, document, document." — Pennsylvania superintendent.
- "Guts and luck!" Kansas superintendent.
- "Build an air-tight, written record of at least 18 months' duration, hire a lawyer and proceed from day one with the hearing and trial considered inevitable." — New York superintendent.
- "Insure due process. If you do, it works. If you don't, nothing works." — Virginia superintendent.
- "Build a case history of evidence of incompetence which the school attorney approves as the basis for a court proceeding." — Colorado superintendent.
- "Use extreme care in preparing the case. Be able to prove what you are charging." — California superintendent.
- "Have plenty of documented evidence of incompetence and lots of patience." — Oregon superintendent.
- "Follow state guidelines and law. This requires having volumes of data and following due process. While it's a lot of work, it's the only way." — Connecticut superintendent.

## How Districts Lose Cases

Legal experts and lawyers experienced in terminating teachers were asked in interviews for this **Critical Issues Report** why districts lose cases. They gave 10 reasons:

- They do not follow the law.
- They do not adequately document their case.
- Superintendents fail to adequately prepare administrative staff to understand the law.

Floyd G. Delon, professor at the University of Missouri, cites two causes for loss of dismissal cases:

- The policy which the staff member supposedly violated did not exist in writing.
- The district ignored the policy.

Robert T. Baker, an attorney with the Columbus firm of Means, Bichimer, Burkholder and Baker, says districts lose because of:

- Inability to establish the case. "We are not always successful in convincing the court that termination is warranted. Even though the case is there, we are sometimes unable to develop it."
- Principals are not tough enough.

Chester Nolte cites three common errors school districts make in dismissal cases:

- Boards overreact and "go off half-cocked" without coolly analyzing the strength of their case.
- They get poor legal advice.
- They act like the case is cut and dried. When this happens, they give the impression that they've already made up their minds before the hearing.

Another view is that districts lose cases because of the fuzziness of state statutes, nitpicking on procedural matters by counsel for the staff member, and not enough attention to procedure by school districts. (Lawyers prefer to challenge on procedural rather than substantive grounds, said one school attorney, simply because it's easier and takes less time.)

Hugh G. E. MacMahon, legal counsel for the Maine School Management Association, considers each teacher termination case "different." "Whether charges in any given case will satisfy the statutory requirements for dismissal is difficult to determine," he told Maine superintendents. In addition, he said, "the range of procedural issues which can arise during the course of dismissal proceedings is limited only by the ingenuity of counsel for the teacher. Many of the issues which could come up cannot be predicted with any certainty."

### Answer These Questions Before Acting

Before taking a disciplinary action against any employee, says Floyd G. Delon, professor of educational administration at the University of Missouri, superintendents should work with their boards to answer five basic questions:

1. Does the conduct interfere with the operation of the school or harm the school community?
2. Can the conduct reasonably be assumed to coincide with grounds listed in state statutes or board policies?
3. Does the conduct warrant disciplinary action regardless of the employee's race, sex, national origin?
4. Is the conduct an exercise of a fundamental right, such as an express Constitutional right?
5. If the conduct is publicly cited as reason for the disciplinary action, will it stigmatize the employee and foreclose opportunity for future employment?

By analyzing a situation based on these questions, superintendents and boards will be better able to decide to (1) drop the matter, (2) seek legal counsel or (3) take appropriate action.

## 'Arbitrary and Capricious' Actions Lose Cases

**Teachers may appeal — and win — dismissal and nonrenewal cases if they can prove that the school district's action was "arbitrary and capricious."**

**But, what does "arbitrary and capricious" mean? The U.S. Court of Appeals for the First Circuit said in one case that a reason may be arbitrary and capricious in any of three ways:**

- **"Even in view of the broad scope of a school board's discretion, a reason may be unrelated to the educational process or to working relationships within the educational institution. She [the teacher] may not be dismissed for the type of automobile she drives or for the kinds of food she eats."**
- **"A reason may be arbitrary in that it is trivial . . . ." [A reason is trivial if it does not justify the sanction imposed.]**
- **"A reason may be arbitrary [if] it is wholly unsupported by a basis in uncontested fact either in the statement of reason itself or in the teacher's file."**

## What's Required To Win

Experts on school law say the first consideration for any administrator considering possible staff dismissal is simply this: What does state law and district policy require?

If the first step in building a case is knowing why and how staff may be legally separated from jobs, the second step is scrupulously following prescribed procedures. That includes procedures for giving notice, hearing and appeal.

The other most important steps in winning cases:

- Make evaluations tougher.
- Make sure teachers are given a chance to improve.
- Allow adequate time for building a case.
- Use an attorney.
- Choose a legally permissible reason.
- Collect "good" evidence.
- Be consistent.

## Dismissing a Tenured Teacher

In dismissing a tenured teacher, districts generally must meet five requirements, according to Theodore H. Lang, professor of education at the City University of New York:

1. A legally permissible cause.
2. Compliance with the prescribed statutory process and with due process.
3. Record of observation and evaluation, citing specific efforts to warn the teacher and to assist in improvement.
4. Hard and substantial evidence, collected in a Constitutionally permissible manner.
5. "An overlay of good faith in the process."

### Requirement #1:

## A Legally Permissible Cause

The basis for dismissal must be within the general or specific causes for dismissal set forth in state statutes. (Forty-one states define cause specifically.) Even where grounds are listed, case law must be examined to understand what type of conduct may reasonably be controlled. And, notes Lang, the basis for the school board's action to dismiss must be both reasonable and substantial.

Generally, the cause must be related to the educational process and to working relationships within this process. A cause which is remediable entitles a teacher to notice of the complaint and time to rectify conduct. Districts will need legal advice in determining what is remediable and what is not.

Districts can expect to be challenged if they make an arbitrary judgment that irreparable damage has been done to students, the faculty or the school. They also can expect to be challenged if ample opportunity is not allowed a teacher to rectify questionable but remediable conduct.

**Suggestion: Seek legal interpretation.** School administrators are advised to ask legal counsel how state courts have interpreted statutory charges for dismissal. Ohio attorney Robert Baker advises, for example, that "usual and ordinary inefficiency" is not sufficient to establish a case for contract termination. He says a district has to show "gross inefficiency."

**A good idea to copy.** The legal department of the Seattle Public Schools holds two seminars annually to explain due process and other legal requirements to school principals. In addition, it holds one annual seminar to bring administrators up to date on court decisions or changes in state law that may affect school operation.

### Requirement #2:

## Due Process

State statute may spell out specific requirements concerning notice, hearing, representation by counsel and appeal. Examples follow:

**Notice:** Under teacher contract laws, almost all states say specifically that notice of discharge or nonrenewal must be in writing. Several states allow for a personal interview in lieu of written notice. Some states require that the employee be informed of the cause of the dismissal or nonrenewal. In 11 states, a statement of cause must be given only upon the request of the staff member. Notices to dismiss, in some states, must contain reference to the specific statute or rule the teacher is alleged to have violated. Sometimes, all pertinent evaluations must be provided along with the notice.

**Hearing:** The right to a hearing may be automatic or available only on request from the employee. In some instances, state law specifies that a hearing may progress without employee input if the employee fails to request a hearing. Sometimes, failure to request a hearing renders the hearing notice a notice of termination. The time lines for holding hearings are varied. One state makes provision for a hearing within two days after the teacher has received notice of dismissal. In other states, the amount of time varies from "immediately" to "not more than 60 days after the request."

**Counsel; Appeal:** Forty-three states specifically allow for counsel at a hearing. Eighteen states provide for appeal to an administrative agency, e.g., the state education agency. Statutes in 30 states specify that appeal may be made to a court. In 17 states, the appeal must be made within 30 days; other states provide timelines for appeal ranging from 10 days to one year.

### Requirement #3:

### Observation and Evaluation

State statutes obligate school districts to meet diverse requirements on evaluation. Eighteen states specifically require the evaluation of continuing contract, tenured or nontenured teachers.

Some state statutes specifically tie evaluation to dismissal. For example, Pennsylvania statute details the use of evaluation in determining whether a professional employee should be dismissed for incompetence. It says employees should be rated by an approved rating system which gives due consideration to personality, preparation, technique and pupil reaction.

Many states specify the number of times or the number of minutes teachers are to be evaluated annually, and several states give teachers the right not only to see the evaluation report and discuss it with supervisors but to respond in writing to it. The response then becomes part of the teacher's personnel file. Kentucky law requires that charges by the school board in the termination of a continuing contract be supported by written reports of teacher performance.

### Requirement #4:

### Good Evidence

The burden of proof in dismissal cases is on the school district. The exception is when an employee claims that dismissal or nonrenewal is based on exercise of a Constitutional right. The employee bears the burden of proving the claim; then, the burden shifts to the school district. It must prove that the dismissal was actually based on another, valid reason.

State statutes often infer or state directly that failure to notify a career teacher of an inadequacy in performance is considered conclusive evidence of satisfactory performance.

### Requirement #5:

### An Overlay of Good Faith

This requirement, although unstated in state statutes, has a Golden Rule quality about it. Perhaps it is best interpreted as being fair in all dealings with personnel, being consistent in the exercise of administrative prerogative and using common sense.

Actions that are arbitrary or capricious not only invite legal challenge but also they assure mistrust and backbiting from employees, with the eventual resignation of the most capable staff members a likely consequence.

Here's another observation from a legal scholar worthy of consideration: Districts that go into a hearing looking prepared, fair in their procedures and determined to win have an excellent chance to do so. On the other hand, a district that gives the impression of cutting corners and using half-legitimate methods may cause the judge to look for a reason for finding against the district.

## What Districts Can Do

These suggestions for building better cases are drawn from responses to the **Critical Issues** survey and from interviews for this report.

### Evaluation

**Make evalutions tougher.** From a lawyer's point of view, evaluations must be made tougher. The legal view of a proper evaluation, moreover, is that it will uncover deficiencies, give the teacher notification of them and a chance to correct them. Lawyers advise administrators to maintain vigilance, to check back often to gauge the teacher's progress in overcoming deficiencies, and to supplement the principal's evaluation with one or more by other administrators. Fred W. Rausch, legal counsel for the Kansas Association of School Boards, advises: "Don't give teachers the benefit of the doubt, particularly nontenured teachers, in doing evaluations."

**Consistency is a must.** The importance of being consistent in making evaluations and in administering personnel policies cannot be overstressed. Districts cannot expect to win court cases if a written evaluation report of a teacher's performance is glowing and the verbal report is just the opposite.

Similarly, consistency in administering personnel policies is a must. The Talmadge (Ohio) City Schools advises as part of its Corrective Discipline Program:

> "Your most marginal teacher sets the minimum standard behavior in your school. It doesn't matter how many 'stars' you have on your staff. In terms of discipline and arbitration the teacher who is doing the worst in the area of concern has automatically set the minimum standard

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## Know Your State Law on Terminations

The following worksheet is intended to help administrators and board members outline the rules they must follow in making dismissals. The answers can be found in state law and in court decisions and administrative rulings interpreting state law. (State departments of education, state professional organizations and school attorneys can help with the answers.)

A caution is in order: The worksheet, even with all of the answers filled in, is no substitute for good legal advice. But it can help administrators and board members get thoroughly acquainted with legal requirements — the first step toward making successful dismissals.

1. Included under the teacher contract law in my state are:
   ____ All certificated employees
   ____ Superintendents
   ____ Principals

2. Legally acceptable reasons for dismissal or nonrenewal are:
   ______________________________

3. The cause for dismissal or nonrenewal may be determined by:
   ____ The school board
   ____ The school board or the superintendent
   ____ Other

4. An employee must be provided with a written notice of dismissal or nonrenewal.
   ____ Yes ____ No

5. The notice must contain a statement of cause.
   ____ Yes ____ No

6. The notice must include a statement that the teacher may request a hearing.
   ____ Yes ____ No

7. The notice must include a time, date and place for consideration of the issue.
   ____ Yes ____ No

8. The notice must be formally filed with the board.
   ____ Yes ____ No

9. Failure of the teacher to request a hearing means that the hearing notice will serve as a notice of termination.
   ____ Yes ____ No

10. Failure of the employee to request a hearing means that the board's decision will be final.
    ____ Yes ____ No

11. The teacher's request for a hearing must be submitted in writing.
    ____ Yes ____ No

12. When must the hearing be held?
    ______________________________

13. Who is charged with conducting the hearing?
    ______________________________

14. Must the hearing be conducted in public or in private?
    ______________________________

15. Counsel for the teacher is specifically allowed at the hearing.
    ____ Yes ____ No

16. An oath or affirmation of witnesses is required.
    ____ Yes ____ No

17. The law says that evidence *must* be heard.
    ____ Yes ____ No

18. Cross-examination of witnesses is allowed.
    ____ Yes ____ No

19. Subpoenas may be used.
    ____ Yes ____ No

20. The hearing must be confined to "cause."
    ____ Yes ____ No

21. A hearing transcript must be kept.
    ____ Yes ____ No

22. A copy of the transcript must be furnished to the employee free of charge.
    ____ Yes ____ No

23. The board's decision on a dismissal or nonrenewal requires a majority vote.
    ____ Yes ____ No

24. A decision by the hearing examiner is final.
    ____ Yes ____ No

25. The decision must be put into written form.
    ____ Yes ____ No

26. The employee must be notified of the decision immediately.
    ____ Yes ____ No

27. Appeal of a decision may be made to:
    ____ An administrative agency
    ____ The courts
    ____ No appeal is allowed

28. Appeal may be based on
    ____ The record
    ____ New evidence or testimony

29. The decision may be appealed by
    ____ The employee
    ____ The aggrieved party

30. When must the appeal be made?
    ______________________________

## Is It Worth It?

Is going for a dismissal worth the time, money and wear-and-tear on everyone involved? Is it more humane to put up with a floundering, but well meaning employee or to demand improvement, knowing full well what the final outcome will be? Do employees perform better when there is some sense of accountability or when job security is not a primary concern?

These are the kinds of questions administrators contemplate in deciding whether to go for a dismissal.

But, some stark facts cause pause in administrative resolve to take action against incompetent teachers. For one thing, track records on dismissal can be discouraging. (One New York State administrator considered a "less than 30 percent" rate of dismissal by a hearing panel as "very successful.") Some administrators fear long drawn out court cases. (A recent trend, however, is toward greater use of non-court techniques for settling dismissal cases: hearing panels, arbitration and other administrative proceedings.)

In deciding, "Is it worth it?" other factors must be considered. Robert Crowe, superintendent of Jacksonville (Ill.) Unit District No. 117, says, "If we're having a problem with the teacher, that means students also are having problems. I think we have an obligation to do something about it." He adds: "If we have done our homework, we're going to win most of the time. The courts generally will not substitute their judgment for that of the evaluator."

A second consideration: unsatisfactory teachers often are unhappy — with themselves, their jobs, their poor performance. "We could be doing them a favor by letting them go before it's too late," states a Connecticut educator.

And, finally, consider this observation by a California superintendent: "One of the main parts of our job is to make decisions about personnel. It's not easy, but that's one thing we get paid to do. No one else in the system can do it."

and has become the measuring stick to be used. To prove this, who was the teacher in your school who was tardy the most times last year? How many? This is your minimum standard of performance in that area. It will continue to be the minimum standard until you correct it."

The district's statement implies that the employee who is cited for violating a rule must have the worst record with regard to it. If this is not the case, a district may be giving the teacher a defense of prejudice or bias.

**Evaluation should be based on district standards and include "sample evidence."** Some districts specify in their evaluation forms the kinds of "sample evidence" that indicate teachers are meeting district standards. The idea is to reduce the guesswork and subjectivity of the evaluator. And, presumably, if the sample evidence shows competence on the part of the teacher, then a judgment of incompetence could more easily be substantiated if the sample evidence were lacking. (See particularly the descriptions of the Flushing, Mich., and Seattle systems in the chapter on evaluation.)

**Problem: What if unsatisfactory performance is discovered late in the year,** for example, after a second evaluation conducted in January or February? In some states, this could mean that the district could not give the teacher sufficient time for improvement prior to the statutory date set for handing out final notices of unsatisfactory performance. One solution suggested by an Oregon attorney is to agree in writing with the teacher to waive the date of the final evaluation and to establish in a written agreement a new deadline that would allow sufficient time for the teacher to make the needed improvement, if possible. The attorney cautions, however, that "the evaluator who discovers unsatisfactory performance only late in the year should be prepared with good reasons why it was not discovered earlier."

**Fair Warning:** Districts lose cases when they fail to give the requisite number of evaluations as required by contract or when they fail in some other way to observe the evaluation procedures agreed to in collective bargaining.

**Suggestions for better case building through better evaluation:**

- Assure that evaluation forms allow for straigtforward criticism of the teacher's performance.
- Supplement checklist evaluations with brief narrative paragraphs to be used in citing specific criticisms of performance.
- If state statute gives permissible reasons for teacher dismissal, be sure that evaluation is directed at those areas.
- Observe the timelines specified in state statute (where aplicable) for giving teachers written copies of evaluations.
- Evaluations and other documents must have a chronology that can "withstand the test of legitimacy."
- Prior to follow-up conferences on evaluations, write out observations and recommendations. This gives the meeting structure and offers assurance that all points will be covered.
- Outline the areas of dissatisfaction and make it extremely clear that a certain amount of progress will be required by a certain date.
- Evaluate consistently and frequently the inadequacies

of teaching performance until the evidence is secured and overwhelming.

- Supervise and evaluate aggressively during the early years of employment.
- Avoid surprises.
- Get legal advice during the whole process.
- Don't become emotionally involved; try to remain objective.
- Take advantage of many informal opportunities at the beginning of the year to evaluate, advise and help teachers. "You can save many teachers if you get at them early," advises AASA Executive Director Paul Salmon. "Don't make the mistake of saying 'I'm going to let them settle in before I start evaluating them.'"

## Notice of Deficiency

Don't use the "sandwich" technique in giving notice, advises Ohio lawyer Robert Baker. "This technique doesn't work when going into a dismissal because it is not considered proper notice to the teacher."

What is the "sandwich" technique? "It means giving notice during a casual conversation," Baker says. In other words, the principal puts something nice before and after the pat on the back, the "how are you doing," the general chit-chat and the final "keep up the good work."

**But going to the other extreme won't work either.** Supt. Jim M. Slezak of the Mt. Diablo Unified Schools, Concord, Calif., explained to an AASA convention audience that disciplinary conferences between principals and staff members should — if possible — end on a low key. "Don't end it in the middle of a heated argument." Such conferences, he advised, should convey a message of seriousness to the teacher and reflect specific rights and wrongs. Moreover, principals should convey a sense of genuine willingness to continue dialogue and to help the teacher.

**Other hints for better disciplinary conferences:** All conferences or meetings with teachers on disciplinary matters should be followed by a written summary, detailing the date, time, names of involved persons, witnesses, if any, what transpired, objections of the involved party, recommendations for improvement and the date for the next conference. Parties involved in the conference should receive a copy of the summary and have an opportunity to present a written reaction to it. In follow-up conferences or memos, the supervisor or evaluator should review the recommendations and gauge the degree of compliance and any changes on the part of the teacher. Carefully documented records emanating from such disciplinary conferences can weigh substantially in the district's favor if it decides to go for dismissal.

## Improvement Efforts

**Specify targets for improvement; document improvement efforts.** Districts must carefully prepare and thoroughly document efforts to help staff members improve. One way some districts do this is by including an item on evaluation forms which requires a listing of the activities to be undertaken by the teacher to correct specific deficiencies. Both the teacher and the evaluator are required to sign the form. Generally, the signatures acknowledge that both parties have seen the form, not agreement with its contents. Some districts require, however, that the "goals for growth" or "improvement" must be mutually agreed to, as indicated by the signatures of evaluator and teacher.

Taking the preceding idea one step further, the 6,750-student West Des Moines Community School District includes in its evaluation instrument space for listing "performance areas needing improvement this evaluation period." In addition, "performance improvement targets" are assigned priority ratings and target dates, as follows:

**Performance Improvement Targets:**

| *Priority No.* | *Target Dates* |
|---|---|
| _____ | __/__/__ |
| _____ | __/__/__ |
| _____ | __/__/__ |

**What to include in a plan of assistance.** Some districts, such as the Almont (Mich.) Community School District, use a separate plan of assistance to detail needed improvement. Almont's plan includes:

- The teacher's name, school and teaching assignment.
- A statement of deficiency which directly refers to the unsatisfactory areas of performance indicated in evaluation.
- A general statement of the plan of assistance, including its purpose, the role of the administrator, the directive "that the plan must be followed," and what action will occur if desired improvements are not achieved or the directive is not satisfactorily met.
- The specific program to be followed.
- The monitoring system, including a schedule of conferences and observances to determine progress, the method of altering or adjusting the program and a specific time for final assessment.
- A final evaluation, detailing satisfactory or unsatisfactory completion of the program.
- A recommendation regarding the future status of the teacher.
- Signatures of the teacher and administrator, including dates.
- Specification of who is to receive copies of the plan.

**Note:** If a teacher will not voluntarily participate in devising an improvement plan, the administrator or supervisor should prepare one in detail, with copies placed in the teacher's personnel file and sent via certified mail to the teacher. In addition, some districts send a copy of the plan of assistance to the local teachers union.

## Collecting Evidence

**What kind of evidence should be collected?** The New Jersey Department of Education advises local districts to collect "all relevant information" in bringing charges against a teacher. Such information, it says, may include:

- Names of all employees or other individuals who may have direct knowledge concerning any one specific charge.
- All evaluation reports, correspondence, memoranda and any other written record which is pertinent to a specific charge.
- Exact information concerning dates, times and places when an incident occurred with a direct relationship to a specific charge and the names of all witnesses who were physically present at the time of such incidents.

**What's the minimum amount of evidence to rate a teacher unsatisfactory?** The Colonial Northampton Intermediate Unit No. 20, Nazareth, Pa., advises its administrators that the minimum amount of evidence to bring an unsatisfactory rating against a teacher includes:

- Anecdotal records showing specific evidence of behavior.
- Evidence that the employee has been informed in writing of the specific deficiencies.
- Evidence in writing of suggestions and assistance to overcome deficiencies with reasonable time allowed for improvement.

**Anecdotal records are admissible as evidence,** says the Talmadge (Ohio) City Schools, provided:

- Staff members are aware they are being kept as a matter of administrative practice.
- Staff members are informed that the records may be reviewed on request.

**Tip:** The Talmadge district advises that all written charges, including anecdotal records, should include mention of the specific rule that was not followed.

**What must the evidence show?** The Kent, Wash., school district advises administrators that evidence must be prepared so that it shows: the persistent nature of the teacher's difficulties, repeated warnings to the teacher of the unsatisfactory nature of work or conduct, offers of assistance, close supervision and an "ordinary class structure." (In explaining the latter term, the district says evaluation of the teacher's classroom work must be made under "usual, not exceptional, circumstances.")

**What are the characteristics of good evidence?** The Kent schools advise administrators that evidence must be:

- Specific in nature. "General charges carry little weight. Factual evidence of deficiencies in specific professional competencies and personal qualities must be presented."
- Extensive in scope. "An isolated case does not constitute sufficient evidence except under unusual circumstances."
- Recorded. Specific charges should be supported by written memoranda made by the observer following observation of the deficiencies. Written records should be made immediately of all offers of assistance and advisory conferences.
- Visits to classrooms should be dated and timed. "Visits lasting a considerable part or all of a period are more likely to provide good evidence than a brief visit."
- In original draft form. The district says written evidence presented at a dismissal hearing should be the original draft. "Materials that have been reorganized or copied at a later date in preparation for a hearing have been thrown out by some courts and may not be acceptable as evidence."

**Hints for better evidence collecting and documentation:**

- "Include the trivia." — Don Moran, Kansas School Boards Association.
- "Build such a comprehensive case that the teacher will have second thoughts in fighting the dismissal." — Moran. In one Kansas nonrenewal, says Moran, the complaint documenting a teacher's inefficiency ran three pages, single spaced. Upon seeing the charge, the teacher accepted nonrenewal and withdrew the request for a hearing.
- Never use the terms "alcoholic," "mentally ill" or "schizophrenic" in a teacher dismissal case. — Gary M. Little, Seattle Public Schools.
- Find out what effect offensive acts outside of the classroom have on classroom performance. For example, Fred Rausch of the Kansas Association of School Boards advises that if a teacher is found driving while drunk, find out what if any effect carries over to the classroom.
- Keep notes on any actions which cause parents to say, "I'm not going to have my child in that class." — Fred Rausch.
- If a district cannot collect enough evidence on its own against a teacher accused of a crime, it sometimes can suspend the teacher and wait for the trial. The court may be able to uncover enough evidence to give the district sufficient evidence for dismissal. — Gary M. Little.

## Preparing Charges

**Make charges clear, factual . . . and complete.** The charges against a teacher "should contain a clear, factual statement of the teacher's violations," advises Hugh G. E. MacMahon, legal counsel for the Maine School Management Association. General allegations such as "unfit to teach" are inadequate, he says. Rather, the charges should be specific enough so that the relevant conduct is described with reasonable certainty and the teacher involved will be able to prepare a defense and not be taken by surprise at the hearing. In addition, the charges should be made complete enough to encompass all of the evidence which will be introducted at the hearing.

What should a charge contain? One suggestion is that the "ideal" charge has four elements:

1. An objective description of the teacher's act or failure to act.
2. A comment on the detrimental effect on pupils.
3. The remedial suggestions/directions given to the teacher by the administrator or supervisor.
4. A statement of the fact that the teacher did not follow through on the suggestions/directions.

Note the specificity and scope of the following charge, provided by the counsel for the Los Angeles County schools:

> "On September 30, Doe appeared totally unprepared and was unable to answer questions addressed him by pupils concerning the subject matter being taught. Doe was directed to submit lesson plans for review. This was not done.
>
> "On November 30, Doe seemed unable to communicate subject matter to students. He fails to follow up assignments with meaningful discussions. Despite suggestions, lesson plans are not being prepared.
>
> "In the evaluation conference with the respondent on December 20, Mr. Cactus suggested that lesson plans be prepared and submitted to the consultant before the start of each week. Respondent expressly refused to comply with this suggestion and stated that 'he would continue to teach the way he wanted to.'
>
> "On September 22, the respondent forcefully struck a pupil (Joe Campi) in the head with a book, knocking the student from his desk seat onto the floor.
>
> "On or about November 3, the respondent in the presence of his students made scurrilous and profane statements. On this occasion, in response to talking at the rear of the classroom, the respondent yelled at the class to '!!0?**@##!!.'
>
> "On April 1, Mrs. Campi (Joe's mother) appeared at school to confer with the respondent in connection with her child's educational progress. The respondent was rude and contemptuous toward the parent, telling her that 'it would be a waste of time to even discuss your stupid kid.'
>
> "The respondent insulted the faculty chairman at the teacher's meeting of October 15, by angrily telling him to 'get lost.' The statement was made in response to the latter's request that the respondent participate on a textbook review committee."

**Tip: Be specific and factual.** Guidelines provided by the School District of the City of Ferndale, Mich., advise principals to be specific and factual in the writing of observed incidents, visitations and observances. The guidelines list terms which are "general and difficult to substantiate" and those which are "specific and capable of being substantiated." Examples follow:

| General | Specific |
|---|---|
| numerous, frequently, often | six times |
| incomplete lesson plan | goals and objectives were omitted from plans for the month of May. |
| continually sent students to office and counselors | referred 61 students to office and counselors for such minor behavior problems as "X," "Y," "Z" (specify). |
| safety of children is of great concern | at least 9 children were shoving desks about the room. 2 children (names) were knocked to floor. |
| room is disgraceful | two bulletin boards have remained unfinished for the past six weeks. |
| had no control over class | many children chattered to each other, four were drawing pictures, six were out of their seats while Mr. X was giving directions. |
| completely out of control | 9 children sitting on their desks; 4 children were shouting to each other. |
| inaccurate mathematics discussion | explained that one number of a binomial may be divided by a monomial to simplify an algebraic fraction. |
| pupils do not give attention to teacher | six pupils (names if known) were at the window during the spelling introduction.<br>nine students were out of their seats while Miss Doe gave the assignment.<br>four pupils (names if known) in the front row were discussing a comic book during mathematics lesson. |
| is frequently tardy | was more than 10 minutes late on January 3, 6, 22, 30, Feb. 4, 9, 13.<br>was late for the VI hour class (following his lunch) on October 9, 16, 18, 19, 27, & 30. |
| violates provisions of master contract | refused to confer with parent and student (names) during preparation time on January 16. |
| unsatisfactory relationships with other staff members | refused to consult with other Primary Unit teachers on standards for promotion, May 16. |

## Release Procedure
## Unsatisfactory Probationary Teachers
## Jefferson County Public Schools
## Lakewood, Colo.

| Description of Action | Action Date |
|---|---|
| Teacher should be observed, and principal should identify teachers who need help. | Prior to Oct. 30 |
| Principal should provide written evaluation, a planned program for improvement, and confer with the teacher who has problems. | Nov. 10 |
| Follow-up conference with the teacher who has problems. | Dec. 15 |
| First semester evaluation with recommendations as to whether the teacher is under consideration for nonrenewal. | Jan. 15 |
| The principal should transmit to area superintendent a list of probationary teachers who may be considered for release at the end of contract year. The teachers concerned must be notified in writing of this action. | End of 1st semester |
| The area superintendent should furnish the assistant superintendent with a complete list of probationary teachers under consideration for release. | Feb. 1 |
| The principal should apprise the area superintendent of the final decision to recommend release of probationary teachers. | Prior to March 1 |
| The area superintendent should furnish the assistant superintendent with a list of probationary teachers recommended for release and the specific reasons for the recommendations, and should notify each principal concerned of this action. | March 1 |
| The principal should confer with each teacher and provide notice of the recommendation for nonrenewal. | March 2-5 |
| The personnel division should notify each teacher in writing of the board meeting at which the superintendent will recommend nonrenewal. | Prior to 3rd Tuesday in March |
| The superintendent should make the recommendation to the board; the board should act on it. | 3rd Tuesday in March board meeting |
| The personnel division should notify the teachers of the board's action by certified mail. | Prior to April 15 |

## Conducting Hearings

**Tips for better hearings:** The main point to remember is that hearings have a twofold purpose: to provide an opportunity to establish the validity of the charges and their relationship to the statutory grounds for separation and, secondly, to provide an opportunity for the teacher to rebut the charges or minimize their importance.

Other tips from Maine's Hugh G.E. McMahon:

- Preparation of charges by an administrator's subordinates or by teachers is not desirable from an administrative standpoint. Preparation of charges by a school board member threatens the impartiality of the member during the hearing process.
- If state statute does not provide set time limits for hearings, it is generally best to set the date far enough in advance so the teacher will have adequate time to confer with counsel and prepare a case.
- Reasonable requests from the teacher for records and other evidence to be used at the hearing should be complied with "to make the hearing as open and fair as possible."
- Following the decision and within a reasonable time after the hearing, the board must render a written decision setting forth the reasons for its decision and making finding of fact sufficient to support the decision. If more than one reason for dismissal exists, the record should make clear that the dismissal is based on such reasons separately.
- The decision must be delivered to the teacher by the method specified in state law or district guidelines.

- Fact finding sessions and hearings should be held in closed sessions, whenever possible, to protect the teacher. Following a closed session, the board can take its final action by motion and vote in a public session. The reason for the termination can be stated briefly, such as "just cause" or "inefficiency." Legal experts say such a reason, briefly stated, is not enough to cause problems, e.g., defamation of the teacher.

## Meeting Timelines

**Use a checklist.** Since meeting timelines is so important in complying with state laws on dismissal, many districts provide administrators with a checklist, detailing dates and guidelines to be followed in terminating staff. (See the sample checklist used by the Jefferson County Public Schools, Lakewood, Colo., detailing the procedure to be used in releasing unsatisfactory probationary teachers.)

## Advice on Using an Attorney

**Why?** "If a school district does not contact its attorney in attempting to terminate a teacher, it will undoubtedly fail to follow one of the required statutory or judicial procedures," says Gary M. Little, attorney for the Seattle Public Schools. He adds: "Because opposing attorneys and courts tend to think legalistically, the educator needs his own advocate who can assess his educational goals from a legal perspective."

**When?** "Immediate" involvement of an attorney appears to be one key to winning staff termination cases. Attorney Robert Baker of Ohio says the involvement should start before any action is taken against the teacher. Another lawyer, Barry Bennington of Kansas, adds: "After the district has built the case is often too late to call in an attorney." He advises hiring an attorney when the district first sees a problem so that the case can be built cooperatively. Early involvement, he says, means the attorney can direct the collection of evidence, become familiar with the case and handle it competently in court. That notion is seconded by Don Moran of the Kansas School Boards Association. "We've seen too many cases where lawyers go into court cold and get clobbered."

What happens in practice often is exactly opposite suggested procedure. Charles R. Kennedy, a Wadena, Minn., attorney told an AASA audience: "Usually the attorney gets on the scene shortly before termination." In one case he worked on, the termination had to be completed by April 1. "The school board president called me in the last week in February," Kennedy recalled. "In reviewing the teacher's file, I found that the district was worried about him for a year, but the only action was 'to tell the guy we didn't like what he was doing.'" Not only was the notice deficient but, Kennedy noted, a reasonable time for improvement "is not one or two weeks."

**What Does the Attorney Do?** When called for a staff dismissal case, Baker says, he looks at the evidence, the quality of the documentation and whether the reasons for dismissal fits statutory requirements. He then tells the district whether its case is weak or strong. "I start asking the questions that I know will be asked later and play the devil's advocate." If the case is weak in Baker's judgment, he makes suggestions to strengthen it, structures the remaining evidence gathering and advises district personnel to come back later with more documentation.

Kansas' Bennington says he immediately queries a superintendent about the specific rule the teacher has violated and whether the teacher is knowledgeable about the rule. Bennington also asks for a list of witnesses and documentation of charges. He interviews witnesses himself to find out what they will say in court. This is so "administrators won't elicit answers they want."

In Oak Ridge, Tenn., the supervising principal of an employee facing possible dismissal is summoned to the central office for a session with the school attorney. The attorney reviews the data, explains the law and tells the principal what further information is needed and what due process steps must be followed.

**How Much Does It Cost?** Estimating the cost of dismissing a teacher is hazardous at best. An attorney's fee is only one consideration. Also to be considered are the costs for evaluations, fees for review panels or dismissal appeals boards, and indirect costs, e.g., administrative staff time.

The estimates of costs given by attorneys interviewed for this report varied widely. One attorney said his records showed bills of $200 to $1,700 for handling dismissal cases. Another estimates that $5,000 would be the limit for attorney's fees in a tenured teacher termination. One attorney advised that he spends about 25 hours putting together a case for a hearing but that, if the case goes to court, much of the work is already done.

One way for a district to save both time and money, one lawyer advised, is to get to know and work with one attorney or firm so that some standard forms can be drawn up.

Don Moran of the Kansas School Boards Association said he believed that the better the case, the more likely it could be handled cheaply in court or result in a resignation.

On the dismal side, one Missouri administrator said his district incurred costs of $60,000 in trying to dismiss a staff member for incompetence. After four years' effort, the district lost in court.

**Where to get legal help.** Many districts already employ an attorney on a regular basis or to handle specific problems. Others might consider seeking help or advice from:

- Other local school systems, particularly larger districts.
- The legal department or counsel for the state department of education.
- A law firm that is well known for its experience in handling education cases.
- The state school boards association.
- The Council of School Attorneys. It has 500 to 600 members nationwide and operates under the aegis of the National School Boards Association. NSBA will furnish the names of member attorneys in an educator's state. Contact: NSBA Council of School Attorneys, National School Boards Association, 1055 Thomas Jefferson St., N.W., Washington, D.C. 20007.

CHAPTER VI

# Dismissal Hearings: Winners and Losers

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The following summaries show the ways that courts and administrative tribunals handle dismissal cases, the kinds of evidence they require and the reasons for their decisions. All are actual cases.

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## Incompetence

The school district filed a seven-paragraph charge against a tenured teacher, charging him with refusal to cooperate, disruptive conduct, distribution of confidential school records, failure to give proper instruction and threatening to file suit against the principal. However, no dates were cited for these incidents and only some of the charges were connected to specific incidents.

The court reversed the dismissal and reinstated the teacher on three grounds: (1) No facts were stated in the charges upon which the teacher could formulate a defense, either as to dates or the specific nature of the acts; (2) on one of the charges, the district didn't cite violation of any specific written rule; (3) no statement of instructional deficiency had been furnished to the teacher. "The charge as it is framed could be validly asserted against almost anyone, as it is more subjective than objective," said the court. Facts, not conclusions, must be alleged, it said. (Kentucky Court of Appeals, 1967)

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## Incompetence

A California district filed charges against a tenured elementary teacher with 27 years of experience. The 32 paragraphs of charges alleged that the teacher improperly administered a standardized test, failed to group pupils properly for math, lost control of her class, didn't follow directions in presenting a special reading program, caused pupils to regress in reading ability, failed to give reading instruction to named pupils on specified days, failed to teach spelling to named pupils on specified days and refused to permit others to enter her classroom to help her. A date was named for each incident. Many of the charges were supported by memos from the principal which contained three things: (1) an objective report of what was seen in the teacher's classroom, (2) conclusions drawn from the observation, (3) recommendations for correction. This form was followed in each of the memos, some of them two or more pages long.

A hearing committee ordered the teacher dismissed. "The district's efforts resulted in little or no improvement by (the teacher) in correcting said deficiencies," it noted. (California Administrative Hearing, 1976)

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## Incompetence

A tenured second-grade teacher was terminated by an Illinois board of education. The board's reasons included the teacher's failure to require enough work from pupils, inaccurate grading of papers, intentionally grading higher than work merited, violation of rules and her statements that she intended to keep on violating rules.

The court reversed the dismissal. It found that at least some of the charges were "supported by competent substantial evidence," including the teacher's grading errors and the fact that pupils leaving her class needed remedial work. But the court said there was no evidence that her deficiencies were reported to her or that she was warned she might be dismissed if they weren't corrected. "In fact," the court concluded, "the school superintendent and school principal both testified that they had never made any complaint to the (teacher) personally about the causes or reasons for which she was dismissed." There was "nothing to suggest that she would not have corrected the causes if she had been warned that failure to do so might result in charges." (Illinois Appellate Court, 1963)

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## Low Pupil Achievement

An Iowa school board voted not to renew the year-to-year contract of a teacher with 10 years' experience. The board cited the low achievement of her pupils in language arts, in the Iowa Test of Basic Skills and the Iowa Tests of Educational Development. Her school had been put on the state's unapproved list and had been given a year by an accrediting association to correct deficiencies. The teacher took the matter to court, arguing that using pupil test results to rate her was educationally unsound and violated her rights. A federal district court held for her, saying that a teacher's competence cannot be determined solely on the basis of student achievement.

But an appeals court reversed the lower court and upheld the nonrenewal. "The administration of the internal affairs of the school district before us has not passed by judicial fiat from the local board, where it was lodged by statute, to the federal court. Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of Constitutional dimensions. They are particularly appropriate to state and local administration." (U.S. Court of Appeals, 8th Circuit, 1973)

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## Incompetence

A California district filed charges against a veteran teacher on the grounds that she couldn't maintain control of her class. It established that on specified days pupils caused disruptions in her class, that loud noises from her class disturbed other classes, that another teacher had to bring her class under control, students climbed over desks, the teacher had screamed at one student and had pulled the hair of another.

A hearing committee ordered the teacher returned to duty. It said it was convinced that the teacher had shown unfitness for service, had demonstrated incompetence and had engaged in unprofessional conduct. But it charged that "only a minimal effort was made by the administration to assist her in the specifics of how to resolve the problem." It added: "The nature of the comments and suggestions made by the administration were generally negative, rather than positive." Such evidence fails to establish that, given proper assistance, the teacher still will not improve, the committee said. (California Administrative Hearing, 1976)

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## Incompetence

A permanent teacher was notified that she had 30 days to show satisfactory improvement. The notice stated that the board of education "wishes to notify you that improvement is needed in the following areas: 1. relationship with students, 2. enthusiasm in teaching, 3. disciplinary policies, 4. relationship with parents." After the 30-day period expired, the board sent the teacher another letter, giving specific detail on the four deficiencies. (State law required "stating specifically" the causes for termination.) The board then terminated the teacher.

The court reversed the termination. "All four charges were so broadly drafted that (the teacher) had no way of knowing exactly how she should improve her conduct during the trial period." At best, the later, more specific letter could only trigger a new 30-day improvement period, the court said. (Missouri Court of Appeals, 1976)

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## Incompetence

An Illinois school board refused to reemploy (and thus grant tenure to) a high school counselor with 2½ years' experience. The board charged the counselor with resisting attendance at evening parent meetings, refusal to submit required reports and refusal to take either paid or non-paid extra duties. The teacher, a member of the negotiating committee of the teacher association, said such duties were not in his contract. He filed suit in federal court, charging that the nonrenewal was based on his work with the teacher association.

The court rejected his argument and upheld the nonrenewal. The school board had kept itself free of signs that it resented the teacher's union activities. It, in fact, had just recently promoted another active association member to department head. "There is no evidence in this record to support the contention that the board did not act in good faith," said the court. "To the contrary, the record amply supports the conclusions that the board made a bona fide value judgment based upon information available to it and that it fairly exercised a discretion with which it was clothed in performance of its important public responsibility." (U.S. Court of Appeals, 7th Circuit, 1971)

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## Insubordination

A tenured music teacher notified the superintendent that she planned to be absent for a week in March to travel to Jamaica with her husband. She arranged for a substitute to take her class. The superintendent wrote back, however, refusing permission for the absence. The teacher went on the trip anyway. When she returned, she was suspended, given a hearing, then dismissed.

The court upheld the dismissal. "In the wake of (the teacher's) conduct come grave doubts among school administrators, recriminations and jealousy among teachers, and an attitude of laxity and self-indulgence, possibly affecting the entire school community. These are consequences which the law does not require school administrators to condone." (Supreme Judicial Court of Maine, 1975)

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## Insubordination

A Nebraska high school economics teacher used looser discipline and more unconventional teaching methods than those typical in her school. This caused problems when a substitute teacher took her classes during her attendance at a seminar. A confrontation between the substitute and students ended with the substitute slapping a student. When the regular teacher returned, she suggested that students should walk out of class in the future if such confrontations occur. The principal reprimanded her and instructed her to use more conventional teaching methods, not to discuss the slapping incident with students and to stop teaching politics in class. The teacher failed to do this, and the board of education voted to discharge her. In court, the teacher argued that her freedom to choose her teaching methods had been abridged.

The court disagreed and upheld the discharge. "Simply stated," it said, "our conclusion is that (the teacher) was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method, or (2) as phrased by the district court, 'to teach politics in a course in economics.' " (U.S. Court of Appeals, 8th Circuit, 1972)

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## Misconduct

During racial troubles at a Connecticut high school, a tenured English teacher helped distribute leaflets denouncing the principal and a work-study program at the school. She twice refused instructions to meet with the principal to discuss her actions. The board of education terminated the teacher. She filed suit on the grounds that her First Amendment rights were violated.

The court upheld her dismissal. It said that teachers generally retain their First Amendment rights when they become teachers. However, school districts may legally regulate such normally protected rights when the teacher's statements are false, when the conduct has an adverse impact on faculty and students and when it appears that the district is acting for educationally sound reasons, rather than in retaliation. "The impact of carelessly made false statements on the day-to-day operation of the school was immediate and harmful, and served to exacerbate the already tense and divisive situation that existed at the school," said the court. "The (teacher) was discharged for a willful violation or disregard of standards of behavior which the board had every right to expect of one of its teachers." (U.S. District Court, Connecticut, 1975)

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## Immorality

The state revoked the credential of a California teacher on the basis of a report by a second teacher that the two of them had engaged in homosexual conduct a year earlier. The conduct took place outside of school hours and didn't result in criminal charges or notoriety. The teacher under inquiry resigned. He had taught in the state for a number of years, with no complaints being made concerning his conduct inside or outside of the classroom.

The court reversed the state's action. It said that charges of immorality "denote immoral or unprofessional conduct which indicates unfitness to teach." But, the court said, there had been no proof that the incident affected the teacher's fitness to teach. Nor, said the court, was there evidence that the teacher might make advances toward students, that in the classroom he might advocate improper conduct or that his relationship with other teachers had been affected. (California Supreme Court, 1969)

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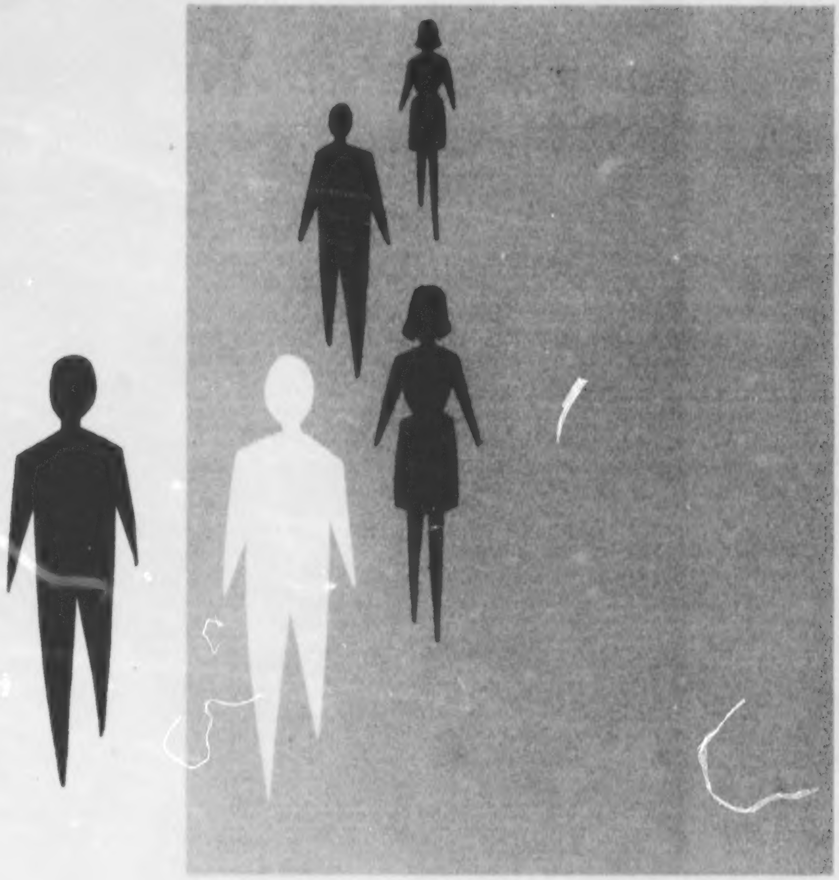
## Drug Use

Because of family problems, a tenured California English teacher began using drugs. His work had been superior, but he started to come to school unable to function properly. The district tried to help him, but without success. It finally filed charges against him, supported by a file full of dated and signed notes made during the three previous years by staff members who came in contact with the teacher. These records (1) objectively reported the teacher's physical condition (loss of balance, inability to communicate effectively, extreme fatigue), (2) his poor effect on students and (3) his violation of district rules on attendance, punctuality and notice of illness.

A hearing committee ordered the teacher dismissed. "The factors cited herein adversely affected the children that the (teacher) was assigned to teach," the committee said. And it found that the teacher had been "encouraged, counseled and assisted on many occasions by school and district officials." (California Administrative Hearing, 1973)

## CHAPTER VII



# Reduction in Force

The second part of this report explains why and how any teacher — not only an unsatisfactory teacher — can lose a job. The loss occurs when a district is forced to make a reduction in force, or RIF.

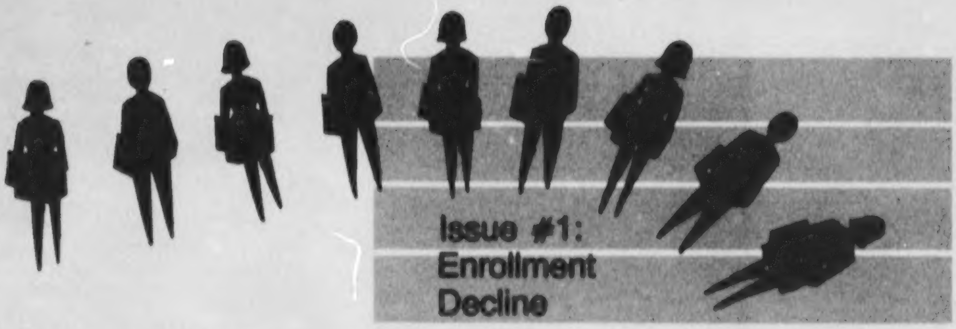
RIF is a recession era word succinctly defined by school law expert Chester Nolte: "to reduce, cut, thin down to size." The victim of a RIF sees it in a different light. He may say he's been busted, fired or given a pink slip. Legislators and policy makers, on the other hand, may not call a RIF "a RIF," preferring instead any of these terms: furloughing, involuntary or unrequested leave of absence, involuntary nonrenewal, layoff, suspension, release with honor, excessing, termination, honorable release.

Whatever it's called, a RIF is at best a distasteful activity, says Francis Haun, superintendent of the Wayne, Nebr., schools. At its worst, he adds, RIF is totally nasty, causing distrust and disruption within a faculty and staff that last for many years.

Maybe because they are distasteful, school districts have not moved as rapidly as they should in developing policies, assuring complete and accurate collection of data and keeping the public informed of the condition and problems of local schools — all necessities for the day when districts might have to RIF employees.

Many school districts already have experience with RIFs, having been victims of elementary student declines during the period 1971-75, the "early warning period" of decline. As early as November 1974, for example, the Educational Research Service of Arlington, Va., found that 36 percent of 573 school districts had been required to take steps to cut back the size of professional staff, mainly due to reduced enrollment. In 80 to 90 percent of those districts, however, the required reductions were made through normal attrition, as opposed to layoffs or demotions.

The "early warning period" is past. While elementary school enrollment peaked in 1969, it took eight more years — the equivalent of a child's passage through elementary grades — for secondary enrollment figures to turn downwards. Elementary school enrollment is expected to pick up about 1983, but secondary schools won't see those students until the 1990s. In the meantime, secondary enrollment will drop precipitously.



# Issue #1: Enrollment Decline

Federal projections show a 15 percent decline in secondary school enrollment between 1976 and 1984. At the end of the eight-year period, secondary schools will have 2.3 million fewer students. In the next four years, 1985-89, secondary school enrollment will decline by another 1.3 million students. Secondary schools will be serving an estimated 25 percent fewer students in 1990 than they were in the nation's bicentennial year, 1976.

How do national projections and massive numbers translate into losses and gains at the local level? Although the effects will be uneven, few if any districts will be untouched. Even those not experiencing disastrous declines can expect to have little turnover in personnel compared to earlier days.

To give some idea of how pervasive decline will be: One state, Minnesota, figures that 86 of 87 counties will have fewer students in 1980 than they had 10 years earlier. A state spokesman explained that 10,000 fewer teachers would be needed in 1987 than a decade earlier if the current teacher-pupil ratio is maintained.

To retain the total number of teachers now employed, said the Minnesota spokesman, will cost $550 million more over 10 years than if the reduction is made. "With so many other competing demands for tax money, the people of the state probably will not be willing to spend over a half billion dollars in that fashion," he said.

Further complicating the declining enrollment/pinched budget dilemma of school districts is the disparity between teacher supply and demand. Because of it and because unions exist to protect jobs, teachers unions are bargaining harder on job security clauses. They are attempting to lock districts into tight and inflexible staffing patterns.

Some districts are prepared for possible RIFs; others are simply worried. In September 1976, for example, 20 percent of the respondents to a survey by the *American School Board Journal* said they were caught policy-less in the midst of a RIF. Another 17 percent said they had planned ahead and developed a policy to be used when needed. Why no policies for the remainder? Twenty-six percent offered that they did not anticipate any future enrollment declines.

More recently, the **Critical Issues** survey conducted for this report found that 42 percent of the respondents considered layoffs and staff dismissal a problem of "serious" proportions. Further, the survey found it not uncommon for some districts, particularly in the Northeast, to have to RIF 10 percent of their staff in a critical year.

The remainder of this chapter details the three factors that figure prominently in RIFs: enrollment decline, teacher supply and demand and lack of money.

The chart shows that public school enrollment did a roller coaster climb between 1964 and 1971. Decline started the following year, with an upturn in enrollment predicted to start about 1983-85.

The total enrollment decline of 1.07 million students in grades K-12 between 1970 and 1975 looks small when compared to the 3.63 million student decline predicted for the period 1976-85.

Public School Enrollment
Fall 1965 to 1985

(In thousands)

| Year | K-12 | K-8 | 9-12 |
|---|---|---|---|
| 1965 | 42,173 | 30,563 | 11,610 |
| 1966 | 43,039 | 31,145 | 11,894 |
| 1967 | 43,891 | 31,641 | 12,250 |
| 1968 | 44,944 | 32,226 | 12,718 |
| 1969 | 45,619 | 32,597 | 13,022 |
| 1970 | 45,909 | 32,577 | 13,332 |
| 1971 | 46,081 | 32,265 | 13,816 |
| 1972 | 45,744 | 31,831 | 13,913 |
| 1973 | 45,429 | 31,353 | 14,077 |
| 1974 | 45,053 | 30,921 | 14,132 |
| 1975 | 44,838 | 30,545 | 14,294 |
| | | **Projected** | |
| 1976 | 44,393 | 30,072 | 14,321 |
| 1977 | 43,721 | 29,463 | 14,258 |
| 1978 | 42,854 | 28,753 | 14,101 |
| 1979 | 41,924 | 28,199 | 13,725 |
| 1980 | 41,109 | 27,876 | 13,233 |
| 1981 | 40,518 | 27,819 | 12,699 |
| 1982 | 40,113 | 27,923 | 12,190 |
| 1983 | 40,070 | 28,158 | 11,912 |
| 1984 | 40,324 | 28,446 | 11,878 |
| 1985 | 40,758 | 28,830 | 11,928 |

Source: National Center for Education Statistics: *Projections of Education Statistics to 1985-86.*

The decline resulted from a large drop in the birth rate. The post World War II baby boom of 43 million births between 1947 and 1957 became a baby bust when the number of births dropped by 10 million — to 33 million —

between 1966 and 1976. Whereas in 1957, the fertility rate was 3.8 children per woman, it dropped to its lowest point in U.S. history — 1.76 children per woman — in 1976. The low rate is expected to hold through 1990, but an increase in the total number of babies born is projected as the baby boom generation enters child bearing years.

The boom/bust figures have been reflected unevenly in school district enrollment figures. Some areas continue to grow amid general decline. Some districts are more affected than others by shifting populations. The differences are caused by moves from public to private schools in the same area, by moves from urban to suburban and rural areas, and by moves within the same megalopolis but farther and farther from center city as a reaction to the closer-in/higher house prices dilemma.

School people are more aware now than 10 years ago of what to look for in figuring future enrollment: demographic projections, zoning and land use plans, realtors' projections, employers' plans for the future, implications of desegregation, flight to the suburbs and house prices.

(**Note:** AASA's handbook, *Declining Enrollment: What To Do*, offers detailed guidelines to help administrators and boards predict future enrollment and deal with the consequences of decline. It is available for $2.50 per copy from AASA.)

More than 36 million Americans, almost one in five families, move each year, with the most restless people found in the West and Southwest. The largest growth areas are the South and West, where more than half of the nation's people now live. Thus, while the Northeast and the North Central areas lost 1.6 and 2 percent, respectively, of their population between 1970 and 1976, the population of the South increased 4.7 percent, that of the West, 5.3 percent.

These generalizations don't always hold when applied to individual states, not to mention different areas within each state. To illustrate: The number of students dropped between 1970 and 1975 in two big Northeast states, Pennsylvania and New York, while Maine, Massachusetts, Vermont and, particularly, New Hampshire experienced increases. And, while the number of students decreased in California, the neighboring states of Arizona and Nevada experienced gains and Utah's school population remained static.

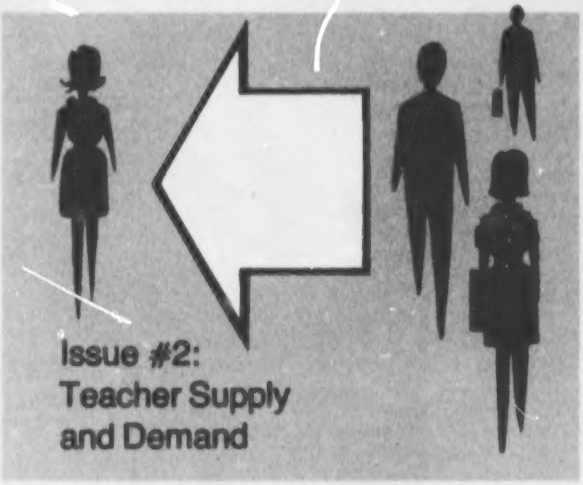
The National School Boards Association revealed in *Declining Enrollment: Its Challenge for Urban School Boards* (NSBA, 1055 Thomas Jefferson St., N.W., Washington, D.C. 20007; $3.50, 26pp.) that several of the 50 largest U.S. school systems had enrollment decreases of as much as 23 percent between 1971 and 1978. All decreased by at least 10 percent.

The Education Commission of the States (ECS) used a case study approach to explore the uneven effects of decline in *The Fiscal Impacts of Declining Enrollment* (ECS, 1860 Lincoln St., Denver, Colo. 80203). In studying four states — Michigan, Missouri, South Dakota and Washington — ECS found declines in student population ranging from 1.8 percent to 7.8 percent between 1970 and 1975. Its projections show, moreover, that Michigan and Missouri are experiencing their biggest declines now. ECS projects that Michigan will have an enrollment drop of 9.5 percent in the period 1976-80; Missouri, 7.9 percent. South Dakota, which lost 7.8 percent between 1970 and 1975, will have lost another 2.7 percent by 1980. Washington's predicted 5.4 percent loss from 1975 to 1980 is slightly above the 4.6 percent decline it experienced in the previous five-year period.

## Secondary Student Decline Coming Up Fast

The optimism engendered by prospects for increased elementary school enrollment starting in 1983-85 is somewhat dampened by the problems schools must overcome until that time. The most immediate problem is the adjustment needed as secondary schools start to experience massive drops in numbers served.

Public secondary school enrollment, which grew steadily from 1965 to 1976, then started on a downward slide. The end result will be approximately 16 percent (2.4 million) fewer students by 1985. And, even with the projected upswing in elementary age youngsters, there will be 4 percent (1.2 million) fewer K-8 students in 1985 than nine years earlier. Secondary school enrollment will be down a total 25 percent in 1990.



Several factors are significant in figuring teacher supply and demand. They include the number of new graduates, the number of experienced teachers who have been away from but want to return to teaching, the teacher turnover rate, class size and any actions (such as starting or dropping programs) that substantially increase or decrease staffing. The last three items are of most concern to local school board members and administrators, but they cannot ignore overall projections of teacher supply and demand. The reason is simple: they are not being ignored by the teachers unions. Increasingly, job security clauses are being negotiated, and union representatives are looking for ways to maintain and, they hope, to increase membership.

**Background:** Nationwide shortages of teachers that persisted in the United States from the late 1950s throughout the 1960s came to an end in 1970. A teacher surplus started in 1972. The number of new graduates trained as teachers, although falling, still exceeds 200,000 each year. Many do not find jobs, even though school districts are more apt to hire new teachers to fill openings than to turn to more experienced (and more costly) former teachers. Statistics from the National Center for Education Statistics (NCES) show that approximately 70,000 persons prepared as teachers and graduating in the spring of 1977 failed to find employment in the classroom.

Only guesstimates can be made of the number of experienced teachers desiring to get back into the classroom. The National Education Association estimated, for example, that the supply of qualified former teachers exceeded 600,000 persons in the fall of 1976. Of those, it estimated that about 18 percent (or 117,000) sought employment in the classroom that year, in addition to 214,200 beginning teachers. The demand for additional teachers at that time was approximately 154,000.

The traditional 8 percent turnover rate among teachers is now figured more realistically at 6 percent in federal projections of teacher supply and demand. (By contrast, the Illinois Office of Education figured the turnover rate in its state at 13.8 percent in 1970-71 and 10.1 percent in 1974-75.) Some projections show further that fewer teachers than in past years are taking temporary leaves or are moving to other jobs because of the tight labor market. Thus, further slippage in turnover rates is possible.

Based on the 6 percent turnover rate, 1.88 *new* teachers are available for each opening in 1978-79. Further, government projections show that by 1980-81, slightly more than two *new* teachers will be competing for each teaching job. The projections make no allowances for experienced teachers desiring to return to the classroom.

**Outlook:** Many older teachers have already left the classroom because of the declining enrollment crunch, the offering of attractive retirement/work programs and many other

## 'Administrators Need Training in Decline Management'

Katherine Eisenberger, director of AASA's Demographic Awareness Project, indicated what lies ahead for school districts in an interview for this report:

Q. Is the current enrollment decline a one-time occurrence or can we expect future ups and downs on a cyclical basis?

A. Current low enrollment is due to a decrease in births and the fertility rate of American women. Social trends, personal values and mores, economic conditions and many other factors influence fertility rate trends. Human fertility is notoriously unpredictable. Future ups and downs would be very much dependent upon social trends.

Q. When will school enrollment begin to climb?

A. Nationally, an increase in kindergarten and first grade enrollment is expected by 1983-84.

Q. Does this mean we may need more teachers?

A. That depends. The early grades (K-2) may begin to evidence increases, but the number of secondary students will continue to decline through 1990. So total enrollment will decline. Some school districts may be excessing secondary teachers while hiring primary teachers.

Q. Will the experience of the Sun Belt states be any different than the rest of the country?

A. Currently, the Sun Belt states are growth areas in all aspects of our economy and in total population numbers. They should experience school enrollment increases, but not at the high growth rate other areas of the country experienced during the 1950s and 1960s.

Q. What changes do you see for schools nationwide?

A. Efforts to bring about fiscal conservatism and economic and efficient use of school facilities will result in a change in the age and type of student enrolled in schools. There will probably be greater emphasis on including learners of all ages — from the pre-nursery set to senior citizens. New and different educational demands will be created, such as occupational courses and hobby courses for senior citizens. And, in keeping up with the shifts in enrollment in grades K-12, many administrators will have to reallocate resources from one area to another.

Q. What can the administrator do today to get ready for the next 20 years?

A. Administrators need training in 'decline management.' The greatest skill they will need is handling people who are accustomed to growth. They also need skill in budgeting practices when confronted with scarce resources, as well as the ability to establish one or two priority areas in lieu of the many areas available during growth periods.

## NEA Refutes Teacher Surplus

If schools were interested in raising their standards to "minimum quality" levels set by the National Education Association, the teacher surplus would disappear, according to an NEA study. It said "a half million new teachers are needed immediately to meet 'minimum quality' standards in the nation's schools." The NEA said new teachers are needed in the following areas:

- Special education.
- Reduction of overcrowded classrooms.
- Kindergarten and nursery schools.
- Restoration of programs curtailed by financial cutbacks.
- Temporary replacement of teachers having substandard qualifications.
- Helping students in upper grade levels or those who have left school without basic skills; introducing programs for dropouts; improving in-service for teachers.

Undoubtedly, the response of administrators and board members to the recommendations would focus on the one area not addressed in the NEA recommendations: Where's the money to come from?

reasons. The younger teachers employed in their place, it appears, will generally stay there. Many educators foresee a new majority of older teachers as districts experience further enrollment decline.

NCES projects that lower pupil-teacher ratios in public elementary schools will act as the main counter to decreased enrollment at that level. The ratio dropped from 27.6 in 1975 to 21.7 in 1974; a further drop to 19.4 is predicted for 1985. At the secondary level, the picture is quite different. NCES says the sharp enrollment drops in the late 1970s and early 1980s will be too large to be offset by decreasing pupil-teacher ratios (20.3 in 1965; 18.8 in 1975; unspecified but slightly decreased ratio expected in the 1980s). NCES projects that the number of public secondary teachers in 1985 will be 889,000 or 130,000 fewer than in 1975.

All tolled, the total demand for additional teachers from 1975 to 1985 will be 1.3 million (based on a 6 percent turnover rate). If the turnover nationwide is lower, say 4.8 percent, approximately 25,000 fewer additional teachers would be needed annually, or one-quarter million fewer over the 10-year period.

Class Size: Arguments about class size can be expected to continue as the total number of students shrinks, the teacher surplus continues and unions look for ways to keep jobs for as many teachers as possible.

The National Education Association says its views on class size are based on a review of nearly 60 studies. It makes nine generalizations about what takes place in smaller elementary and secondary classes. "Fewer is unquestionably better than more," it says, because:

- Teachers employ a wider variety of instructional strategies, methods and learning activities and are more effective with them.
- Students benefit from more individualized instruction.
- Students engage in more creative and divergent thinking processes.
- Students learn how to function more effectively as members and leaders of groups of varying sizes and purposes.
- Students develop better human relations and have greater regard for others.
- Students learn the basic skills better and master more subject matter content.
- Classroom management and discipline are better.
- Teacher attitudes and morale are more positive.
- Student attitudes and perceptions are more positive.

Those who argue from the opposite point of view often do so by trying to relate class size and student achievement. One example: William F. Murphy, director of field services for the New England School Development Council, says: The safest conclusion that can be drawn from the research on class size is that "class size per se has no consistent effect upon pupil achievement." He believes that class size is only one of several inseparable variables in instruction; moreover, it is inextricably related to each of the remaining variables.

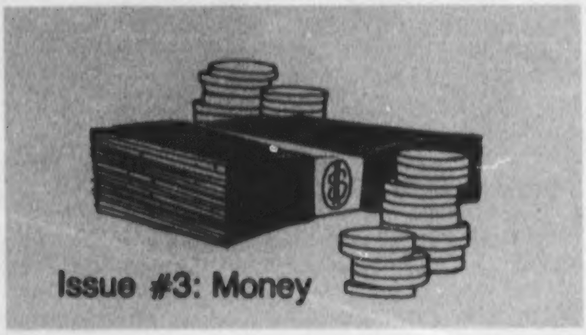
Lawrence McCluskey and Frank L. Smith, two professors associated with Teachers College, Columbia University, concluded: "If one simply reduces the number of pupils assigned to a specific instructional setting, what one 'gets' is fewer pupils in selected settings. There is no reason to believe that the primary clue the professional may use to change the nature or quality of interaction with pupils is a variation in pupils assigned. To 'get' behavioral change," they continued, "one needs to assign fewer pupils to a class with a plan in mind to achieve some specific end."

UCLA professor of education John D. McNeil argues that studies conducted between 1954 and 1975 show no significant different in achievement related to class size. "When differences are found, they are about as likely to favor large classes as small." The one exception, he said, was in classrooms with very young children where the quality of interaction (e.g., more contact between teacher and child) may be inversely related to class size.

Other researchers note that what happens if all classes are changed by one pupil (either up or down) would depend on: the criteria of success, the original class size, the subject being taught, whether or not teachers can exploit the potential of smaller classes by appropriate instruction, and the teacher's feelings and attitudes.

**So the debate is unresolved.** To quote the conservative Council for Basic Education: "To write the last word on class size would be a pleasure, but there is no last word and probably never will be. The revelations of research may one day enable experts to draw definite guidelines, and contract negotiations will provide formulae in the meantime."

**Warning to board members and administrators:** The NEA advised its affiliates to be wary of any attempts by school boards to include assistant principals and nonteaching professional staff as teachers in class size ratios. The NEA commented in *NEA Now* that "school boards have a way of counting those not actually in the classroom as teachers to make pupil-teacher ratios look good."



## Issue #3: Money

Money is the bottom line in determining how districts react to changes in enrollment and figure future staffing needs, including possible reductions in force. If it were in sufficient supply, administrators and school board members probably would agree with teachers unions that a period of declining enrollment is an ideal time to improve, include the "extras," hire staff, expand offerings. But such is not the case.

Inflation in the price of both goods and services has severely decreased the purchasing power of all school districts. The consumer price index, figured from a base of 100 in 1967, rose to 122.2 at the time schools opened in 1971 and to 184.0 by September 1977.

And, while the public is aware what the skyrocketing costs of bread, clothing, fuel, housing, automobiles, insurance, health care and almost everything else does to the family budget, schools have not been very effective in communicating what rising costs have done to district budgets.

Most school districts are also faced with the fact that as enrollment declines, so does state aid. Compounding the situation is the time lag involved in the ability of school districts to cut back on spending as decline sets in.

The Education Commission of the States explained what usually happens in *The Fiscal Impacts of Declining Enrollments:*

> ". . . School expenditures cannot be cut at the same time and at the same rate as enrollment declines occur. The case of instructional personnel provides a good example. In most school districts, teacher contracts must be signed in the spring, long before the late fall, when the precise nature of enrollment drops is determined. This causes at least a one-year lag in personnel cuts. However, before personnel cuts can be implemented, there must be significant enrollment drops in each grade level. A drop of 30 to 40 students in a grade level is needed in most elementary schools in order to provide the possibility for cutting one teacher position. Moreover, even as teacher positions are cut, tenure laws and seniority provisions usually require that the least experienced and, thus, least costly teachers are cut first. This leaves a higher-cost teaching staff in the school, which pushes expenditures per pupil up even if a constant pupil-teacher ratio is maintained. Finally, the within-school lags are magnified across a school district with respect to the magnitude of enrollment declines needed to close entire schools with a minimum disruption of the district's educational program. Thus, operations and maintenance expenditures cannot be reduced much as enrollment declines. A similar inability holds true for fixed costs. In the short run, operation and maintenance of plant expenditures per pupil and fixed expenditures per pupil necessarily increase in declining enrollment districts if for no other reason than that the same total expenditures are divided by a smaller number of students.

**ECS draws these additional conclusions from its research:**

> Declining student enrollment is a phenomenon for school districts of all sizes. Most affected by declines are very large and very small districts.
>
> Seniority and tenure laws as well as the present level of capital equipment (e.g., school buildings) do not permit contraction back along the same path that existed during expansion.
>
> Advance planning can shorten the time lags necessary for making adjustments in expenditures.
>
> As a method of counting children for the allocation of state aid in an era of declining enrollments, a three-year floating average is preferable.

Another factor of financial significance to school districts: Local and state governments are being pressured to limit the amount they increase their budgets. Some states such as New Jersey and Indiana place an absolute limit on the amount a local government budget can be increased from one year to the next.

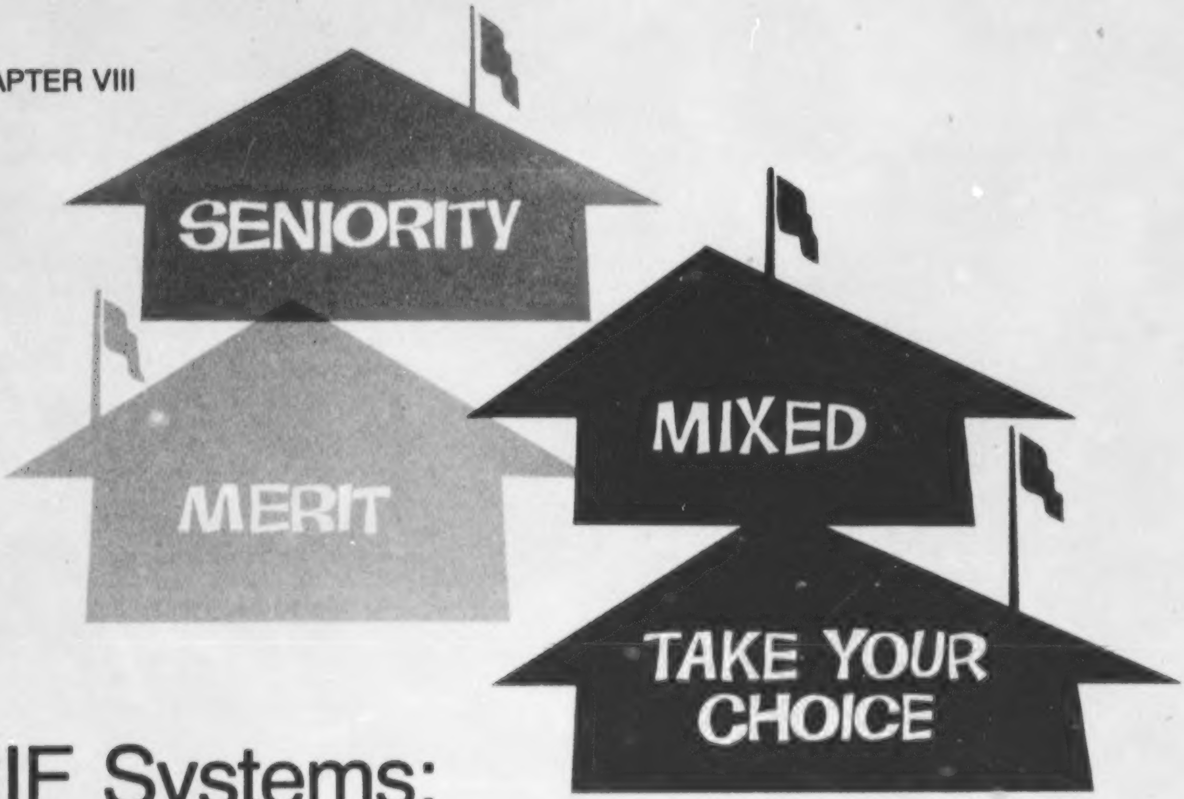
## Conclusion

Although the first surge of elementary student decline caught many administrators and boards unprepared, there's no excuse now for being surprised. The "numbers game" of the early 1970s — how many new students, how many teachers, how much in the budget — will be played more seriously in the future.

It appears that some school districts will get caught in the counter squeeze of shifts in enrollment and union demands for job security. The public will apply pressure to districts where it hurts most — in the pocketbook.

One thing school districts can do is to be prepared for a possible RIF.

CHAPTER VIII



# RIF Systems:

## What Districts Are Doing

RIF systems, as stated in board policies, generally fall into four classifications or bases for determining layoffs:

1. Seniority.
2. Merit.
3. Mixed, e.g., a point system, which takes into account *some or all* of these factors: academic training, experience, additional preparation, length of service and performance.
4. Take-your-choice (board/administrative prerogative).

### Seniority RIF Systems

The most common and widely used (some say "the safest") type of RIF system is based on seniority or last in, first out. It is favored by teachers unions.

Generally, seniority lists are established by categories of teachers within a district. Typically, teachers are initially categorized by the district's regular grade level structure, e.g., K-8 and 9-12 or K-6, 7-9 and 10-12. At the elementary level, the only further breakdown by category may be for the purpose of separating classroom teachers from subject matter specialists, librarians or other "special" personnel. At the secondary level, teachers generally are put into subcategories designating subject matter (e.g., math, science, physical education) and specialty areas such as special education.

Depending on the district, seniority of individual teachers may be figured from the date on their teaching contract or their first day of work. Some districts define in their policies what is considered "full time" and the conditions for counting accumulated part-time work toward seniority. Credit may be given for military service (if it interrupts a teaching career) and for teaching in other school districts. But, if two or more teachers have the same amount of seniority, ties often are broken by giving priority to the teacher with the longest service to the district undergoing the RIF, thereby disregarding earlier teaching experience.

Typically, newly hired teachers who lack tenure and those without proper certification are the first to be laid off in a RIF situation, after all reduction by attrition is made. The most senior teachers are the most secure in their jobs. In districts which take many factors into account in a RIF situation (e.g., teachers' ability, seniority and qualifications), seniority prevails when two or more teachers are judged to be equal in ability and qualifications.

There are exceptions to seniority rules: The negotiated contracts of several school districts, submitted in response to the **Critical Issues** survey, indicated that qualified officers of the local teachers union were to be placed at the top of the seniority list in a RIF situation.

## Sample Policies Based on Seniority

**Centralia, Ill.:** The succinctly written policy of the 2,100-student Centralia (Ill.) City Schools details how a system based strictly on seniority works:

> "When the board determines it is in the best interests of the Centralia City Schools to reduce the number of certified employees, it shall do so in accordance with requirements contained in the School Code of Illinois. Nontenure teachers shall be dismissed before removing or dismissing any teacher who has entered upon contractual continued service and who is legally qualified to hold a position currently held by a teacher who has not entered upon contractual continued service.
>
> "Layoff of tenure teachers shall be based on seniority in the district provided the teacher with longevity in the district is legally certified and meets Illinois Office of Education requirements to teach the grade or subject. Subject matter specialists such as music, physical education and special education must be qualified to teach at grade levels in order to bump a teacher with less seniority.
>
> "If the board increases the number of teachers, reinstates programs, or has a teacher resign or retire within one school term after the dismissal, the board shall first offer reemployment in reverse order to the teachers laid off. A teacher's failure to respond affirmatively within 10 calendar days after receipt of the board letter sent by registered mail to the teacher's address on file with the board of education shall result in termination of the teacher's right of recall."

**Ferndale, Wash: RIF procedures based on seniority; not subject to grievance procedure.** The 3,700-student Ferndale district adopted a new RIF policy in May 1977 which follows strict seniority. The policy provides an opportunity for the local teachers association "to share its views on anticipated reductions with the district," but it clearly states that the procedures are not subject to grievance.

The policy states that the board may determine whether the district's projected enrollment or financial resources demand a reduction in educational programs or services.

Employees who are retained under a reduced program must possess a valid Washington State certificate and have appropriate academic preparation in the subject field or experience (defined as having taught the particular subject under consideration within the previous seven years).

All teachers are ranked by seniority in three districtwide pools: one for K-5 teachers, a second for teachers of grades 6-12 and a third for specialists such as teachers of special education. Music teachers, librarians and teachers employed in programs such as Title I are grouped in the appropriate K-5 or 6-12 pool.

Seniority within the three pools is determined by a teacher's in-state teaching experience, out-of-state teaching experience (eight years' maximum allowed) and military service (two years' maximum allowed).

Teachers are given bumping rights into a pool other than their own only if qualified on the basis of academic preparation and experience.

In situations where more than one teacher has the same amount of seniority, they are again ranked by teaching experience within the district. Any further ties are broken by ranking teachers according to the number of college and inservice credits beyond the B.A. and submitted to the district as of September of the school year.

Finally, ties are resolved by a drawing. Employees affected by the drawing and the teachers association are notified of its time and place and invited to attend.

**Recall rights.** Certificated employees are eligible for recall for 13 months following the termination of their jobs.

### What Happens to Affirmative Action?

One of the most frequently heard arguments against the use of strict seniority in RIF situations is that affirmative action policies and plans are abandoned in the process.

Some districts use a plan which retains teachers on a strict seniority basis, but they provide for retaining teachers with less seniority "if doing otherwise would place the district in violation of its affirmative action program."

Affirmative action policies used by school districts frequently stress only hiring practices and procedures.

Some districts are balancing affirmative action with seniority as best they can. For example, certain certification areas may be closed to application except by minority candidates. Or, when openings occur in specific subject areas, recruiting starts at colleges and universities high in minority enrollments.

Comparatively few districts follow a policy as strong as that adopted in the Litchfield (Minn.) Independent School District. It says its affirmative action policy cannot be violated. "Any person employed in an affirmative action program may be retained in the same field or subject matter of a teacher with greater seniority if it is necessary to effectuate the purposes of such affirmative action program," states the district's policy.

Teachers may be removed from the recall list if they fail to respond affirmatively to a job offer within 10 calendar days from the time the district mails it.

Open positions are filled consistent with seniority and qualifications. The board retains the right to select the most qualified applicant if no certificated person in the employment pool is qualified for the available position. Seniority also is followed in filling part-time jobs. RIFfed teachers may accepted a part-time position without jeopardizing their recall status for a full-time job, and they are given first preference in openings for substitutes. Actual hiring is based on "instructional need" as determined by the principal of the building in which the substitute will work.

**Contact:** Dennis L. Peterson, Superintendent, Ferndale School District, Ferndale, Wash. 98248.

**Note:** In contrast to the Ferndale, Wash., policy, another Washington district of approximately 800 students agreed in its negotiated contract that seniority would be subject to grievance. It agreed to publish and distribute to all teachers and the local teachers association a seniority list by November 1 of each school year. Its contract contains the following clause: "Any teacher who believes that his or her seniority is incorrect may file a written grievance directly to the superintendent for resolution and thereafter proceed to arbitration." It also agreed to provide a second seniority list with corrections, deletions and additions as needed, to the local teachers association by March 1 of each school year.

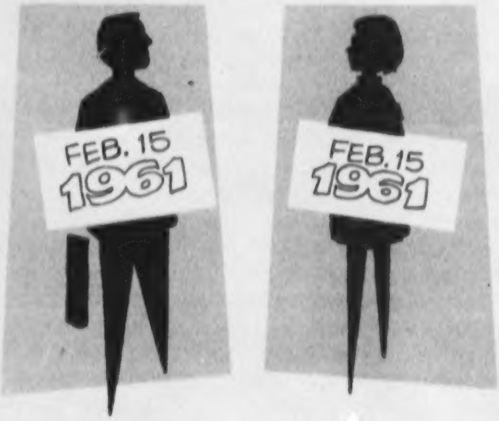
**Flossmoor, Ill.: Seniority as defined in a continuing contract.** School District 161 in Flossmoor, Ill., follows a policy which calls for the board to remove or dismiss teachers who have not entered upon contractual continuing service before removing or dismising teachers employed under a continuing contract. In addition, the board reserves the right to consider certain factors in determining which teachers are to be removed, dismissed or reemployed. The factors are: certification, area of specialization (including degrees, research, publications), experience, length of service in the district, "the teacher's quality of performance as reflected by evaluations and by recognized special contributions to the education of students," references and recommendations. "The board's determination in every case shall be final," the policy concludes.

## RIF Systems Based on Merit

Several state statutes provide for basing a RIF on merit. Missouri law says, for example, that "permanent teachers shall be retained on the basis of merit within the field of specialization."

Districts interested in using a merit RIF system should be aware of the possible problems. One problem: The district may not be able to sell it to the teachers union.

School law expert Chester Nolte says that a merit RIF is "tough to do, but a board can get away with it." If the district is taken to court over a merit RIF, it must be able to prove that the standard used was objective, e.g., a standardized teacher test. The means must look fair and equitable.



## Breaking the Seniority Tie

What happens when two teachers have the same seniority rating? Districts handle such a situation in a variety of ways. Where a strict seniority system is followed, the teacher with the most service to the district (as opposed to all teaching experience) often wins out. Another way to break ties often stipulated in negotiated contracts with teachers unions is to hold a drawing. Districts also break ties in seniority ratings in the followings ways:

- A contract obtained by an Illinois district says if two or more employees have equal length of service in the district, prior teaching experience shall control. If prior teaching experience is equal, the horizontal position on the salary schedule at the time of the RIF decision shall control.

- The Prince William County (Va.) Schools bases dismissal due to a RIF, where two or more teachers have similar seniority, on "the teacher's area of competence, certification, teaching endorsement, quality of teaching performance as determined by past evaluations, attendance and previous teaching experience."

- A Massachusetts district says preference for retention or recall shall be given to the teacher who has achieved the highest level of training.

- The Flushing (Mich.) Community Schools follows a policy which calls for the board to consider majors and minors, professional competence (including graduate work, evaluations and progress reports) and teaching experience, when seniority in service to the district and certification are equal.

Examples of local RIF systems based on or including merit follow.

**Elmhurst, Ill.: Release of nontenured teachers based on merit; seniority and performance ratings used to release tenured teachers.** The 9,250-student Elmhurst Community Unit School District 205 uses data from its regular evaluations to estimate teachers' overall teaching performance. Taken into consideration are expertise in the classroom, contributions to extracurricular activities and to curriculum development, professional and ethical behavior, and professional relationship with students and other professionals outside of the classroom. The rating received by a teacher summarizes his total contribution to the district as shown in all evaluations.

Using the evaluation data, supervisors classify and rank order each nontenure teacher in six categories: kindergarten, primary, intermediate (grades 4-6), elementary specialists by area, junior high (grades 7-8) by departments and senior high (grades 9-12) by departments. Nontenure teachers are released on the basis of the lowest evaluation in each category.

The superintendent and administrative council determine how many nontenure teachers in each category must be released. They may notify that number plus three more in each category.

If tenure teachers need to be released, the district establishes seniority lists for teachers of K-6 and 7-12 (by department). Next, supervisors develop rank order performance ratings based on overall teaching performance. Separate lists are established for each building in the elementary schools and for each department by building in the secondary schools. All elementary teachers who fall into the lower two quartiles of the performance ratings by building are placed on a separate list. Similarly, all secondary teachers who fall in the lower two quartiles by department are placed on a separate grade 7-12 list. Teachers on those lists are dismissed in the order of lowest seniority.

The numerical scores assigned to teachers for RIF purposes are not placed in their permanent record file, nor are they disclosed to the teachers or anyone else. District policy says the scores are strictly for administrative purposes in a RIF or a rehiring "and cast no negative reflection on the performance of teachers." It emphasizes that teachers who are subject to reduction procedures "have given good service to the district and are being released only because of declining enrollment or resources."

Tenure teachers are permitted to bump nontenure teachers in a field where they have legal certification or can obtain it up to and including the last day of school. In situations where two tenure teachers attempt to bump for the same position, the district reserves the right to pick the best qualified candidate, based on interviews.

Recall is based on qualifications to teach in the area open, with the teacher having the most seniority given first chance.

If bumping and rehiring occur in the district, the superintendent reserves the right to make any necessary transfers of staff "to ensure that the best allocation of teachers is available to meet the needs of students and programs." The superintendent also reserves the right to modify the district's RIF procedures "when necessitated by emergency conditions."

As part of adopted board policy, the deputy superintendent is assigned the job of providing assistance to RIFfed teachers in relocating in neighboring districts if necessary.

**Contact:** Merle E. Baker, Deputy Superintendent, Elmhurst Public Schools, 103 S. Myrtle Ave., Elmhurst, Ill. 60126.

**Marshalltown, Iowa: RIF policy based on merit; no grievance procedure allowed.** "When in the sole, exclusive and final judgment of the board, decline in enrollment, reduction of program or any other reason requires reduction in staff among teachers, the administration shall attempt to accomplish the same by attrition," says the policy of the 6,700-student Marshalltown Community School District. When necessary reduction cannot be accomplished by attrition, contract renewals are based on "the relative skill, ability, competence and qualifications of available teachers to do the available work."

If a choice must be made between two or more teachers of equal skill, competence and qualifications, the policy continues, contract renewals will be given to the teachers with the most full-time continuous service in the district.

Alleged violations of the RIF procedures are not subject to grievance. Instead, they are to be discussed first by the teacher and the principal and then by the teacher and the superintendent. If resolution is still lacking, an ad hoc committee of six persons (three appointed by the superintendent and three by the local teachers union) makes a recommendation to the superintendent.

**Contact:** Superintendent, Marshalltown Community School District, Marshalltown, Iowa 50158.

**St. Louis, Mo.: RIF system based on "preservation of the best possible educational program."** The Mehlville School District R-9, serving more than 12,000 students, provides for retaining permanent teachers in times of program elimination or reduction "on the basis of merit within the field of specialization."

Reduction of staff is on a districtwide basis, with consideration given to the following factors: areas of competence indicated by certification; the individual's grade level or departmental preference and experience; seniority; quality of performance (with consideration given to regular and special evaluation reports); and skills in the areas of instructional needs of the district.

The district policy notes that "if all factors are reasonably equal, seniority shall become the determining factor for retention."

**Contact:** Thomas L. Blades, Superintendent, Mehlville School District R-9, 3120 Lemay Ferry Rd., St. Louis, Mo. 63125.

## 'Mixed' RIF Systems

"Mixed" RIF systems — perhaps the wave of the future — allow local districts to combine merit and seniority in whatever combination of weighting is determined to best meet local needs. Some administrators believe that a properly designed point system — considered a mixed RIF system in this report — is more defensible than anything other than a seniority system.

**Be warned, however:** districts interested in implementing such a system, particularly one weighted toward performance, probably can expect a fight from the local teachers union.

Pennsylvania law provides local districts with an opportunity to use a mixed system. It says districts may decrease staff on the basis of efficiency ratings. Districts may devise their own rating system or adopt the model system approved by the Pennsylvania Department of Education. It takes into account a teacher's personality, preparation and technique, and pupil reaction.

Districts determine how many points constitute a "substantial difference" in rating. In effect, districts decide whether to place more emphasis on a teacher's rating score or on seniority. The higher the "substantial difference" figure adopted locally, the more that district is emphasizing seniority; the lower the figure, the more emphasis is placed on the numerical rating, according to an analysis of the system.

Some Pennsylvania districts have chosen to devise their own point system similar to, but not exactly the same as the state-adopted model. An example is the system used by the 3,000-student Central Greene School District, Waynesburg.

Both temporary professional employees and professional (tenured) employees in the Central Greene district are rated using a numerical system. Temporary employees, the first to be furloughed, are ranked and RIFfed starting with the employee receiving the lowest numerical rating.

Professional employees also are ranked on the basis of the numerical ratings, taking into consideration instructional skills, management ability, student reactions, professional attitude, personal characteristics and professional growth. Teachers rated unsatisfactory in an area may be given from 0 to 5 points. If they need improvement, they may receive 6 to 10 points; if satisfactory, 11 to 15 points; if highly competent, 16 to 20 points.

District policy states that where there is a substantial difference (defined as more than 4 rating points) among those under consideration for furlough, a formula incorporating both the numerical rating and a seniority factor will be used. To the numerical rating obtained on the rating form, the district adds .2 point for each year of experience within the district. The professional employee with the lowest total score (numerical rating plus experience factor) is furloughed first. If two or more professional employees hold equally low scores, furlough is determined by drawing lots. If there is no difference in numerical ratings, professional employees are retained on the basis of seniority rights acquired within the district.

**Contact:** Howard C. Robertson, Superintendent, Central Greene School District, Waynesburg, Pa. 15370.

**Iredell County Schools, Statesville, N.C.: Teachers rated on competencies.** This 11,000-student district has effectively used a point system that was developed by a committee of teachers, other staff and community members. A significant factor in the system's effectiveness is local teachers' attitude in favor of competence, said C.H. Lindler, assistant superintendent, in an interview for this report.

Lindler cautions districts interested in adopting a point system RIF of one possible problem: subjectivity on the part of the evaluator. Say a principal rates all teachers about the same in performance. This has the effect of making the other parts of the rating instrument — preparation and seniority — the deciding factors in staff reductions.

Iredell's system works like this: Teachers are rated on 21 personal and professional competencies. Each competency is rated satisfactory, needs improvement or unsatisfactory. In calculating points for the purpose of staff reduction, teachers are given two points for each competency rated satisfactory in the last two evaluations, for a maximum of 84 points. For each competency rated unsatisfactory, two points are deducted. The remaining number, the total performance score, is added to the scores for preparation/certification (a maximum 14 points) and for length of service (a maximum 12 points).

If two persons attain identical scores, the person with seniority wins out. If the amount of seniority is the same,

*Try a little tenderness . . .*

## RIF and Return: Not Unlikely

The Arlington (Va.) Public Schools, in suburban Washington, D.C., had to issue RIF notices to 570 teachers between 1974 and 1977. But 95 percent of the staff members laid off were recalled.

Seattle, a victim of steadily dropping enrollments, laid off 1,600 staff members in 1974-75, but hired back all but 400 using dollars that came from the state legislature. (Teachers also agreed not to take a salary increase, permitting some of the hirebacks.) In 1975-76, 700 Seattle school persons were laid off but all were rehired as part of a strike settlement. The year 1976-77 saw no layoffs, and in 1977-78, programs were expanded.

The moral of the story: In many districts, a spring RIF notice doesn't necessarily mean forever. The teacher RIFfed in April may well be rehired in August.

Experienced administrators advise: Try to make the RIF process as painless as possible for the unfortunate people caught in it. They may be teaching in your district for years to come.

according to district policy, "the superintendent will make the determination as to which person is to be released based on all information available."

**Contact:** C.H. Lindler, Assistant Superintendent, Iredell County Schools, Statesville, N.C. 28677.

**Northwood-Kensett Community Schools, Northwood, Iowa: Point system considers three criteria.** This district of fewer than 1,000 students follows a policy of reducing staff based on three criteria: evaluation, experience and training. Evaluation is worth 30 points maximum, the other two, 35 points each maximum.

Teachers may receive up to three points for each of 10 evaluation items. They include attitude toward students, classroom control and management, knowledge of subject matter and attitude toward coworkers and administrators.

As to experience, each year of teaching experience earns 1 point, with a 5 point maximum for experience gained outside the Northwood district. The district gives credit for up to two years for military service if it interrupts a teaching career and up to three years for vocational experience.

In the area of training, teachers are awarded 10 points for a B.A., two-thirds of a point for each semester hour above a B.A. and an additional 10 points for an M.A.

The district policy states that reduction should follow the order of normal attrition, layoff of employees with emergency or temporary certification or those employed less than full time and, finally, reduction (based on its point system) of teachers within specific categories, e.g., K-6, special education, subject matter teachers in grades 7-12.

The policy allows staff reduction "when in the judgment of the board of education it becomes necessary."

**Contact:** Superintendent, Northwood-Kensett Community Schools, Northwood, Iowa 50459.

**Janesville (Wis.) Schools: Point system weighted toward seniority: training and evaluation also considered.** This district of 13,200 students follows a policy which allows for laying off teachers with the lowest point total. Reinstatement also is based on the point system, provided that the person with the largest total score is certified to fill an available vacancy.

Under Janesville's system, teachers receive approximately 2 points for each year in the system beyond the first two. To illustrate: the first two years nets a total of 2 points; four years' seniority equals 7 points; nine years equals 17 points.

The number of points allotted for training ranges from 1 point for a B.A. degree to 6 for an M.A. and 12 for a doctorate.

A teacher is allowed 0 to 5 points for "individual evaluation," which may include 1 point for extracurricular activities.

If two or more teachers within a specific curriculum area or grade level have the same number of points, layoffs are determined by the date of the original teaching contract, i.e., strict seniority.

**Contact:** Fred Holt, Superintendent, Janesville Schools, Janesville, Wis. 53545.

## 'Take-Your-Choice' RIF Systems

Some boards, in attempts to retain full control of RIF procedures include only loosely defined criteria and procedures in their RIF policies. One example: A Connecticut district says "the board shall consider the following criteria — not necessarily in priority order — in determining staff to be laid off: academic certification, skill and ability, total experience in current position, recommendations of principals and administrative staff, total teaching experience in any district and additional course credits."

The main problem with such a system, some experts say, is a possible court challenge, perhaps charging the board and the superintendent with being arbitrary in their judgment.

Other boards have attempted to maintain some flexibility and control in RIF decisions by including one or more specific provisions in their RIF policies. Examples follow:

- A South Carolina district releases teachers, upon request, from their contracts and gives them the right to reemployment within 12 months following resignation provided it does not interfere with the recall of other teachers laid off in the district.

- In an Iowa district, the order of reduction is as follows: employees with nondegree status, employees "who have been held on the same step of the salary schedule they were on the previous year" and fully certified employees in reverse order of seniority.

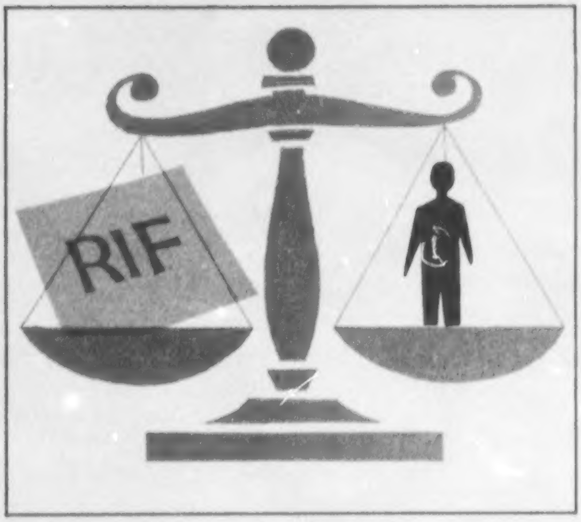
- The Prince William County (Va.) Schools, which serves 37,000 students, says teachers on leaves of absence shall be eligible for dismissal in a RIF.

- A Michigan district of more than 10,000 students includes as part of its layoff procedure this affirmative action provision: "At no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."

- An Iowa district provides for the RIFfing of employees on probation "by reason of unsatisfactory performance" before laying off those who have emergency or temporary certificates.

- A Wisconsin district of more than 8,000 students exempts from layoff teachers with 20 or more years of teaching service, and its says volunteers for layoffs will be considered first.

- The Springfield (Vt.) School District follows a policy which gives the board the right to terminate up to 20 percent of the total number being laid off without regard to seniority. Factors other than seniority considered by the board are preparation, experience, performance, versatility, extracurricular capabilities, staff rapport, community relations, special skills and contributions, needs of the district and community, and the teacher's health.



## Rights of RIFfed Teachers

The second most critical part of a RIF policy (the most important being the determination of who gets RIFfed) is that detailing the rights of laid off teachers. Generally, the rights pertain to the recall procedures and detail who may be called back, in what order, how long RIFfed teachers will be given priority for job openings, and any other jobs (e.g., part time or substitute) for which laid off teachers will be considered.

The amount of time tenured teachers retain recall rights varies from one to three years. Generally, recall provisions are good for one year, and the teacher must accept the first open position offered him in the district or be removed from the recall list. In most cases, the teacher's affirmative response to a job offer must be made in one to two weeks.

Recall follows the order of layoff in most school districts. The last to be laid off is the first rehired, provided that qualifications are met. In some districts, the board reserves the right to recall tenured teachers on the basis of conditions such as "professional background, training and attainment, the length of time in the school system and other relevant factors."

Among the out-of-the-ordinary recall provisions that districts have agreed to are the following:

- An Iowa district of fewer than 1,000 students says an employee who is recalled and returns to work will be placed one step higher on the salary schedule than he was at the time of the layoff.
- A South Carolina district gives a teacher the right to fill a vacancy for which he is not certified but for which an emergency permit may be obtained. The district agreed to help such a teacher obtain a permit from the State Department of Education. It may be used for one year, during which time the teacher may become fully certified.
- A Michigan district agreed in a negotiated contract to allow RIFfed teachers to pay for and retain fringe benefits until such time as the individual finds new employment or for a period of one calendar year from the date of layoff.
- An Oregon district of more than 3,000 students agreed to provide insurance benefits for 90 days for laid off teachers who have less than three years' seniority. Laid off teachers with more than three years' seniority must be provided insurance benefits for 180 days.

## Sample Recall Statements

**Sussex, Wis.: Clearly written recall statement.** A contract between the School Board of Common School District Joint No. 16, Sussex, Wis., and the Hamilton Education Association contains an example of a clearly written RIF recall statement. It says:

> "The district shall recall persons by written notification (certified mail, return receipt requested). Recall notice shall be sent to the person's last known address. Such persons shall have 15 workdays, excluding legal holidays, to accept or reject the offer to return to work. The person shall have 30 calendar days to return after providing written notice to the district (certified mail, return receipt requested) of his or her intention to return. The district will have no further obligation to recall the person in the event that he or she does not comply with these notification provisions. The recall right for persons on layoff shall continue for three years, subject to the notification requirements. However, if before the end of the three-year period, a person refuses a district position in the category from which he or she was laid off, the teacher's layoff rights shall be terminated."

**Contact:** Superintendent, Common School District Joint No. 16, W220 N6151 Town Line Rd., Sussex, Wis. 53089.

**Kalama, Wash.: Extensive detailed recall rights.** An example of a policy which contains extensive detailed recall rights is provided by the Kalama (Wash.) School District #402.

The district provides for certificated teachers to be placed in an appropriate employment pool with the right of reemployment for up to 30 months. Four pools have been established by the district: elementary (K-6 teachers plus elementary librarians); secondary (grades 7-12 with teachers subgrouped by specialty such as science, math, driver education); other nonsupervisory employees (subgrouping by specialty such as counselors, librarians, special education personnel, nurses); and certificated employees in programs funded by categorical moneys.

RIFfed certificated personnel who are recalled by the district are given seven days to accept the position offered. And, unlike many other districts, Kalama allows teachers to turn down the first offer without being dropped from the employment pool.

RIFfed teachers are given first choice, based on seniority, to accept recall to part-time posiitons. They may accept or reject such an offer without jeopardizing their recall status for a full-time position. Upon request, they also are given preferred consideration in the district's day-to-day employment of substitutes.

Recall entitles the certificated employee to reinstatement of seniority and accumulated sick leave and credit on the salary schedule for any training taken during the layoff.

A further consideration for RIFfed certificated employees: They may, while in the employment pool, opt to continue in any fringe benefit program of the district. All they need to do is to reimburse the district for the cost of the program by the first of each month.

**Contact:** H. Carl Ulrich, Superintendent, Kalama School District #402, Kalama, Wash. 98625.

**Kent, Wash.: Teachers' responsibilities in a RIF detailed.** The layoff and recall policy used by the Kent (Wash.) Public Schools, a system serving more than 15,000 students, details more clearly than other policies reviewed for this report the responsibilities that teachers have in RIF situations.

The district allows teachers to select up to four categories for which they are qualified. They are required, however, to be able to furnish within seven days of an administrative request proof of qualifications (e.g., a major, a minor within the last six years or a minor plus a specific amount of teaching experience). The teacher is responsible for assuring that proof of qualifications is available in his personnel record.

Teachers who wish to challenge the district's seniority list must do so within 14 days of its posting in buildings and administrative offices. If a challenge results in a change in the seniority list, the district's personnel office must notify any affected employees on or before 21 days of the initial posting. Any teacher adversely affected by any change has seven days to file a written challenge. Failure to challenge placement within the time limits specified is considered a waiver of the teacher's rights to later challenge.

Teachers laid off in a RIF are entitled to placement in a reemployment pool for three years, with the right to refuse the first and second offer of employment. Refusing the third offer results in the teacher's name being placed at the bottom of the rehire list. Teachers are automatically carried on the reemployment list for the first year they are laid off; however, it is their responsibility to notify the district personnel department between June 1 and June 30 of the two succeeding years if they wish to remain on the list. Failure to do so results in removal from the list. In addition, they are required to file for application on the substitute teacher roster and to notify the personnel department of a phone number where they can be reached.

The district allows a laid off teacher to assign power of attorney to the local teachers union to accept or reject an assignment on his behalf.

CHAPTER IX

# The How-To:

## Advice from the Experts on RIF

Districts should be prepared for a RIF well in advance of the time one might occur. That is the No. 1 piece of advice offered by various persons interviewed for this report: administrators in districts where RIFs have occurred, school law experts, negotiations experts and attorneys. Where a RIF is foreseeable, even on the distant horizon, the planning and preparation should precede the actual fact by at least two or three years. More ideally, five-year planning is suggested.

Cutting of any sort is both a hard decision to make and a hard one to carry out. But, notes William F. Keough, a consultant on declining enrollment from Cambridge, Mass., "indecision and perennial drift" are the main drawbacks to coming face to face with the educational effects of a RIF on one hand and the consequences of a growing financial deficit on the other. He adds: "Once adrift with neither long-range plan nor policy, the haphazard lopping off of staff and programs presents an even greater threat to educational quality than does RIF."

### How Can Districts Prepare?

A fair amount of information and advice are now available on what districts can do in a period of decline. Their biggest problem is one of localizing, i.e., making the advice fit local needs, resources, opportunities and options.

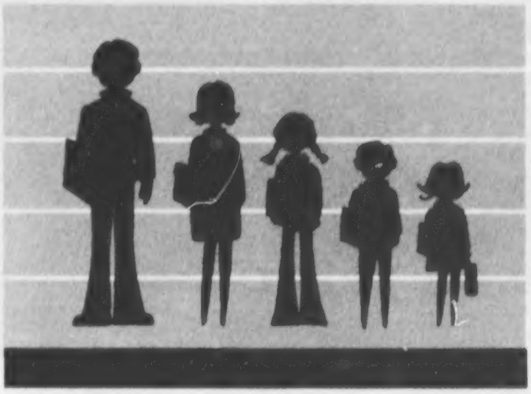
A "master plan" for managing decline often contains the following steps:

- Establish educational goals. If all goals rank equally, then (in the words of one school board president) "you don't have a clear idea of your educational goals or you haven't thoroughly thought out your priorities."
- Compare priorities to the current state of programs, curriculum, staffing and organization.
- Determine future enrollment trends in the district.
- Decide whether more or fewer facilities will be needed and how existing ones might best be used. Similarly, determine future staffing needs.
- Plan for the development, implementation and financing of programs, facilities and services the district will need.
- Provide for systematic review of the "master plan."

# Declining Enrollment: A Crisis or an Opportunity?

Declining enrollment can be a crisis or an opportunity to make changes and actually improve the school system, say two contributors to a federal volume, *Declining Enrollment: The Challenge of the Coming Decade* (School Finance and Organization Group, National Institute of Education, 1200 19th St., N.W., Washington, D.C. 20208; 466 pp.).

The contributors, Paul Berman and Milbrey McLaughlin, contend that how management responds will determine if a decline in enrollment is a crisis or an opportunity. They say management can go either way in following the three steps needed to adjust to decline: mobilization, implementation and institutionalization. A summary of their analysis follows:



**Step 1: Mobilization**
*Response: Crisis Oriented*

- Continue to neglect generating support from staff and community.
- Continue to make decisions in terms of short-run political or bureaucratic concerns.
- Continue to plan from the top down, isolating staff and community from the planning process.

*Response: Opportunity*

- Do comprehensive planning, using some of the improved local forecasting techniques now available.
- Conduct planning to generate broad based support (e.g., community, local and state governments, and staff) for the district's efforts to change its priorities and its allocations of resources.
- Provide outreach activities, e.g., senior citizen programs.
- Develop alternative policies or initiatives to maintain district services.
- Participate in more extensive regional and national cooperative efforts with other school districts; become more involved in state legislation.
- Try out a "council/conference structure" that cuts across the district's divisional lines of authority and involves frequent working meetings of staff and community. Suggested format: representatives of teachers, administrators and parents meet in their separate conference groups, then send representatives to the district instructional council. It becomes an official policy-making body and forum.

**Step 2: Implementation**
*Response: Crisis Oriented*

- Try to deal with change without adequate institutional support, e.g., teacher commitment and principal support.
- Continue ineffective management of specialists. Do not consider evaluation results in making decisions about school programs; do not routinely involve specialized support personnel in school operations.

*Response: Opportunity*

- Use the reassignment of personnel as an opportunity to provide inservice training and to develop an ongoing staff development program.
- Improve administrative practices by eliminating, if necessary, "marginally effective administrators and specialists" and by discontinuing duplication of services or functions.

**Step 3: Institutionalization**
*Response: Crisis Oriented*

- Don't attempt to make change a routine part of the district's procedures; let change be a temporary or peripheral add-on.
- Continue to make across the board percentage increases in the budget instead of carefully analyzing each item.
- Start a general retrenchment and precipitously curtail "costly" programs.

*Response: Opportunity*

- Organize and collect cost information in ways that give district officials and board members a sense of the trade-offs among different instructional programs or between instruction and business (or other) operations.
- Institute a budget procedure that exposes hard choices, i.e., how much is being "sacrificed" in one area to meet needs or demands in another area.
- Permit all members of the superintendent's cabinet to participate in decisions on district allocation.

## Four Steps in Cutting

What if a district finds in the process or reviewing its situation that a reduction of people or programs is needed?

Most experts advise the use of a four-step process:

1. Analyze (detail costs; break them down).
2. Compare costs against various sets of standards and against one another.
3. Question (how is each person and each expense contributing to carrying out the district's objectives?)
4. Cut.

## Gather Information on Staffing

Districts must take the initiative in the early stages of decline "to anticipate, to define and to enumerate the number of staff to be retrenched, particularly if historic district staffing patterns and pupil costs are to be respected," warns the New York State Education Department in *Enrollment Trends: Programs for the Future*.

The State Education Department advises districts to look ahead five years in considering possible changes in staffing. To make decisions on future staffing, the department suggests that districts answer these questions:

- What is the prediction on future pupil numbers?
- Can the reliability of these projections be upheld convincingly in the public arena?
- What impact do reduced pupil numbers have on the offerings of the current educational programs?
- Is the makeup of the student body changing?
- Will the tasks and makeup of the instructional program change in the next three to five years?
- Will the current organizational plan change (e.g., K-5, 6-8, 9-12)?
- What future staffing ratios does the district wish to maintain?
- How do these staffing ratios compare with similar state data?
- How many staff will be needed to meet district objectives in the next three to five years?
- In which areas will positions be abolished?
- How much of the staff reduction can be assimilated by attrition?
- Must some of the remaining staff be retrained?
- How does the district maintain a balance in experience, age and competence of the staff?
- How can new programs such as bilingual instruction with recently employed staff be maintained in light of last hired/first fired rulings?
- How are these interrelated questions to be reconciled with collective negotiations legislation, rulings and procedures?

**Two more suggestions:** Districts should anticipate the long-range effects of the distribution of staff on the salary schedule. A finding, for example, that many teachers are not presently at the top of the schedule could mean higher program costs in the future as salaries are adjusted upwards. Another consideration: A person appointed to tenure this year could fill a position which the district will not need in three to five years.

All of these questions should make districts develop and operate carefully planned personnel management systems.

## Guide to a 'Workable' RIF

A RIF, never easy, can be made workable if seven rules are followed, according to Chester Nolte, an expert on school law. Writing in the *American School Board Journal*, Nolte outlined the basic seven:

1. Devise RIF policies and procedures before they are needed.
2. Stimulate "natural attrition" and cut expenses to the bone before using "forced attrition." Natural attrition can include scheduled retirements, move-aways, nonrenewal of probationary teachers, early retirement, long-term leaves of absence. Forced attrition should start with part-time employees before layoff of permanent staff is contemplated.
3. Make the board's position on RIF clear to employees and the community.
4. Make clear that RIFfed teachers have been laid off because of financial problems, not teacher incompetence. Suggestion: Record in the board minutes the reasons for a RIF.
5. Make sure board policies on RIF are legal, taking into consideration both state laws (e.g., on tenure, RIFs and retirement) and federal law (e.g., on discrimination).
6. Determine, after RIF policy is in place, whether to make RIF a bargainable item. (Local circumstance can help make this determination; following the Joneses is not a good rationale in negotiations.)
7. Read #1 again — that is, pass RIF policies including bargained agreements before they are needed.

## What's in a Total RIF Plan?

A good example is that of the Roosevelt School District in Phoenix. In 16 pages, the district's "Plan for Teaching Staff Reduction" includes:

- Legal requirements as outlined in state law.
- The order of reductions.
- Aspects to consider in calculating the number of reductions needed.
- Hearing requirements.
- A copy of the district newsletter announcing the need for a RIF.
- Specific forms needed in a RIF (e.g., notices, questionnaire to determine staff qualifications, letters to staff, forms for reemployment of teachers, board meeting information and board action).
- Day-to-day schedule of a RIF procedure.

Contact Russell A. Jackson, Superintendent, Roosevelt School District No. 66, 6000 South 7th St., Phoenix, Ariz. 85040.

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### *'We got the best law firm we could find.'*

### *Case Study: Jacksonville, Ill.*

When RIF came in a rush to Jacksonville (Ill.) School District 117, the district's leadership wanted to make sure it was on strong ground throughout the process.

"We got ourselves the best law firm we could find," said Supt. Robert Crowe. He and other administrators traveled 250 miles to Chicago to consult with a firm experienced in school law, including RIF. "We bought two hours of their time. We said, 'Talk to us. Tell us what we should do.' We prepared ourselves by learning the experiences of other people through the medium of the law firm."

The lawyers' charge of $120 ($60 per hour) was "money well spent," said the superintendent. It put Jacksonville schools ahead of arising crises and assured the legality of the district's planned course of action. "When the going gets very hot and the association threatens to sue, you can say, 'Go ahead.'"

Through its experience with other districts' RIFs, the law firm helped Jacksonville avoid RIF traps. It gave advice on the ins and outs of RIF of the kind discovered only by districts that have been through them; what materials and procedures need to be in writing; and the kinds of details and data required and the way in which each must be documented.

"Many of the things the lawyers said, we would have thought of; some of them we would not have," said Crowe.

Result: The district trimmed 40 teaching positions (from a total teaching staff of 245) over two years and stayed out of court both years. Administrators consulted with the Chicago lawyers by telephone after the first conference, using the district's local law firm for day-to-day detail work.

On the advice of the law firm, the Jacksonville district made cuts from among its probationary teachers, keeping the better ones and RIFfing the others. In some cases, this meant laying off second-year teachers while keeping first-year ones. The attorneys had said the district could do this under Illinois law without having to explain its reasons to those being RIFfed. The district gave no reasons, and its choices stood up.

To choose from among teachers in such a way, a district's evaluation system must be intact and followed strictly by administrators, said Crowe. "When you jump over seniority in a RIF, you can expect trouble," he added. "Be sure your house is clean on following your own procedures."

**For more information,** contact Robert Crowe, Superintendent, Jacksonville School District 117, 1021 Lincoln Ave., Jacksonville, Ill. 62650.

## Developing a Policy

School boards should be aware that four traps possibly await them if they find themselves in a RIF situation without an adopted RIF policy: a strike, needless sacrifice of school quality, loss of board integrity in the community and, possibly, failure of the RIF, resulting in no layoffs, no cost reductions.

A policy on RIF must fulfill two purposes: It must tell how those to be laid off are chosen and how the process is to be carried out.

Four basic policy questions must be answered:

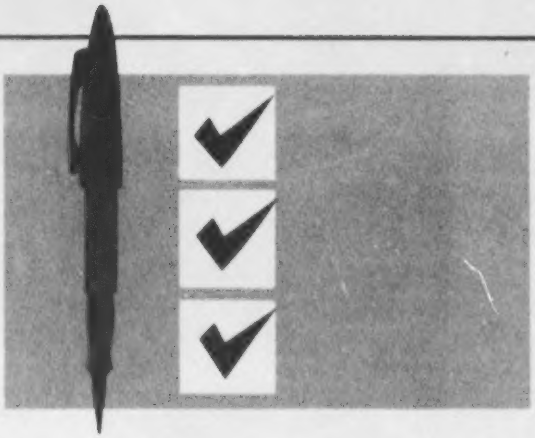
1. What priority should be used to lay off staff? Will seniority, the most widely used method, be used or is quality of instruction also to be considered? Or a combination of both?
2. What rights do laid off teachers have? Can they, for example, bump into the ranks of substitute teachers? How long will they be carried on recall lists? May they keep (and how do they pay for) fringe benefits?
3. What shall be the role of the teachers union? Will RIF be considered a negotiable item?
4. Will the district provide for affirmative action in making a RIF?

**Advice:** Although some school law experts say the suspension of an employee in a RIF will not be upset so long as it is made in good faith and supported by substantial evidence of need, districts are advised to consult with a lawyer in drafting RIF policies.

Another requisite, of course, is that districts be aware of any statutory provisions that define or limit their power in a RIF situation. (RIF decisions generally are not hindered by teacher tenure statutes because tenure is intended to protect teachers from *unjustified* dismissal related to charges of personal or professional misconduct or incompetence and was never meant to guarantee the security of a lifetime job.) Some state statutes say specifically that layoffs and recalls must be based strictly on seniority. Others allow for some consideration of teacher evaluation or certification and qualifications. A possible legal problem is determining the meaning of phrases in state statutes such as "reasonable" or "justifiable" reductions or statements that a RIF may be made only when such action is "advisable." A check with the school attorney or state professional organization can help determine if a state court has interpreted the meaning of such phrases in states where they are part of statute language.

**Who should write the RIF policy?** "The policy should be written in cooperation with lawyers and others with experience," advises a Kansas City administrator. "Don't let the union write it for you — their purpose is to prevent layoffs."

Here's a second opinion from Edward Kelly, superintendent of the Harlem Consolidated School District #120, Rockford, Ill.: "If the decision as to who will work and who will not work is not controlled by the board, the decision as to what is to be taught is lost, as is the decision as to what qualities are most important in teachers and whether or not extracurricular activities will continue. Decisions as impor-



*Get it down in writing*

## A Checklist for Policy Development

The following checklist can be used in formulating a new RIF policy or checking an old one for completeness:

**Who has a voice in making a RIF decision?**

1. What does state statute say?
2. Can the board decide when a RIF is necessary, or is the decision subject to grievance and arbitration?
3. Does the teachers union have any role in determining which teachers are laid off and when?
4. Must someone determine that certain preconditions are met before a RIF can be accomplished, such as the loss of a specific number of students?

**How is the order of layoff determined?**

1. Is the order of teachers on the layoff list determined by: seniority, qualifications (academic preparation), quality of teaching?
2. Must all substitute, temporary or probationary teachers be laid off before tenured teachers? What is the exact order of layoff among these groups?
3. If seniority is the basis for the order of layoff —
   - Will teachers be grouped by grade level and subject area? What about specialists, supervisors and specially funded teachers? Where do they fit?
   - May teachers be listed in more than one seniority "group"? Are they considered "qualified to teach" if they are certificated to teach a subject or have a college major or minor in it, or do they have to have some experience in teaching it?
   - When does seniority begin to accrue, and what effect does a leave of absence have on seniority?
   - If two teachers have equal seniority, how are ties to be broken?
   - Does the last remaining person in a school qualified to teach a particular subject get special treatment?
4. If quality of teaching is used to determine the order of layoff —
   - Is the measure of quality (teacher's rating) expressed in a usable form?
   - Is the evaluation or other rating method fair; will it withstand legal challenge?
   - What method shall be used to break ties between teachers having equal ratings?
5. If a combination of seniority, quality of teaching or other factors is used to determine order of layoff —
   - What formula is to be used to arrive at a final comparative rating?
6. How shall teachers on leave at the time of the RIF be treated?

**What procedure shall be followed?**

1. Should the district compile and publish a list of the order of layoff? When?
2. What appeal is available for a teacher who contests his placement on the layoff list?
3. When should the board determine the number of positions to be cut? When should the affected teachers receive layoff notices? When should the layoffs become effective? (Note: State law may answer some of these questions.)
4. What bumping rights does a teacher have?
5. To what extent is the grievance procedure available to laid-off teachers who complain that district procedures or rules weren't followed?
6. Shall the district make termination pay available to laid-off teachers?

**What rights does a RIFfed teacher have?**

1. Can a laid-off teacher bump a current substitute with less seniority or qualifications?
2. What fringe benefits will be available to laid-off teachers?
3. Will a recall list be maintained to reinstate laid-off teachers? What will be the order of reinstatement? How long may a teacher's name remain on the list? If a job is offered to a RIFfed teacher, must it be accepted? When? What are the consequences of nonacceptance?
4. May the district consider hiring new applicants or must all vacated positions be filled from the ranks of RIFfed teachers, if possible?
5. What is the effect of recall on a teacher's seniority and position on the salary schedule?

**How shall other personnel policies be affected by a RIF?**

1. What provision should be made for complying with affirmative action policies?
2. Should this RIF policy or some other policy provide for the layoff of administrators and nonteaching personnel? If so, may RIFfed administrators bump into teaching jobs? How shall their seniority or quality of teaching be determined?

tant as these should not be decided by any agency other than the board of education."

## Characteristics of a Good RIF Policy

A good RIF policy should be so clear and direct that it can be carried out by the administration without further board action after its decision to reduce staff. It should exactly define the order of layoff and the basis for determining a teacher's place on the RIF list. It should also give the board ample flexibility in making a RIF.

The policy should avoid:

- Stating preconditions such as a certain size enrollment decrease or a specific budget deficit as a trigger for RIF.
- Stating that proportional layoffs will take place in both administrative and nonteaching ranks.
- Promises to "make every reasonable effort to . . ." (make other budget cuts first, find substitute teaching jobs for laid-off teachers, "avoid a RIF if possible").
- Setting any more specific dates for personnel actions than are already contained in state law. Including the state mandated dates in the policy is a good idea; going beyond them is not.
- Granting hearing rights to teachers caught in a RIF, unless required by state law.
- Allowing a third party to decide what revenues are available to the district, in the case of differing figures by the board and the teachers union.
- Promises to maintain "the lowest possible" student-teacher ratio or to commit all cash reserves to use.

Boards have been caught in near impossible situations when they have agreed to such conditions as providing the teachers union with a detailed report of the financial affairs of the district "demonstrating the need to lay off teachers" or giving a one-year notice before any cuts in position could be made.

Caution also is advised in giving union members special bumping privileges, such as one district's agreement that "teachers shall not be bumped or reduced in seniority ranking by school employees who are not represented by the teacher bargaining group."

## Negotiating RIF

Some experts state adamantly that districts should not negotiate RIF clauses. They say the pressure of the negotiating table is not the proper setting for formulating a RIF policy and that waiting for union proposals only courts trouble. Insofar as possible, they advise, the criteria to be followed in implementing staff reduction should be maintained as board policy outside the contract.

AASA advises on job security clauses:

> "Keeping difficult issues off the negotiations table is the responsibility of the school district negotiator. Be the negotiator an outside attorney, a professional negotiator, a school administrator, or a member of the school board, the main function will be to determine those items which are considered non-negotiable. Items which protect the control over the school system operations are essentially the domain of the school board and administration. . . . A firm position on the matter of job security, along with community understanding, will be necessary."

What happens when districts follow that advice?

Here's one report: Edward Kelly, superintendent of the Harlem Consolidated School District #120 in Rockford, Ill., said: "I recommended to the board that the procedure for reducing our staff be adopted and not submitted to the negotiations process, even at the risk of a strike. A short time later we reduced our staff as spelled out in the board policy. When our teachers association wished to subject RIF to the negotiations table our board refused. The association threatened to strike over this item, but failed to gain support from its members because of the fairness with which the reduction had taken place."

The question of negotiated RIF clauses brings to the fore the bigger issue of how much influence collective bargaining should have on the management of schools. The situation is complex. On one side stands the teachers unions. Their primary purpose is to save and, if possible, to expand jobs (and their membership). Teachers themselves are concerned about job security. On the other side are school boards and administrators, confronted by the fact that decreased enrollment means less revenue to operate schools. They must determine how expenses can be decreased while educational quality is maintained.

Salaries and benefits comprise 70 to 85 percent of the school budget which generally means that, even if all other cuts in expenses are made, many districts may eventually have to reduce staff.

The question becomes: Should unions be given the right to determine the conditions under which a RIF would be allowable and how it should be carried out? Should management be locked into retaining programs and services because the teachers who staff them have the most seniority in the system? Or should management be required to retain and retrain teachers at district expense?

Other key questions may have to be answered state by state. Two such questions, which will bear prominently on what districts do in the future, are:

- Can a negotiated agreement on RIF supersede a state statute?
- Can a board lawfully negotiate away its managerial prerogatives or its responsibility for educational policy?

Three labor relations specialists for the New Jersey School Boards Association, William A. Spenla, Garry M. Whalen and Cathleen Otto, conclude in the April 1978 issue of *The Journal of Law and Education* that even if a board of education has legal authority to negotiate over and agree to RIF concerns, management should avoid agreeing to:

- Clauses prohibiting RIF.
- Provisions establishing a minimum class size, number of specialists, number of aides.
- Prohibition against involuntary transfers.
- "Just cause" provisions for nontenured teachers (although courts generally have ruled that layoffs for economic reasons constitute just cause).
- Provisions specifying procedures for RIF and recall of nontenured teachers.

Q

# The Lowdown on RIF

A

Here's a miscellany of questions that administrators and board members have asked about RIF:

Q. How can legal problems be avoided?

A.
- Learn about and abide by state statutes on RIF. Keep abreast of court decisions affecting school district action.
- Be sure that decisions on staff reduction are reasonable and not arbitrary or capricious.
- Do not create a pattern of discriminatory action.
- Be sure that in letting teachers go, their reputations are not damaged. Try not to attract attention in making reductions.
- Keep and publicize a current seniority list. If a lottery is to be used to determine the respective rank of teachers with equal seniority, hold the lottery within 30 days of employment, not when a RIF is imminent.
- Be aware that courts do not look kindly on dismissals for "cause" if a staff evaluation plan is developed and implemented for the first time when a district is faced with the need to reduce staff.
- Don't mix RIF and dismissal for incompetence or other reasons. They are separate issues and should be treated as such.
- Be aware that rigid procedural requirements will be strictly enforced. Districts have had their decisions to RIF overturned because of mistakes in calculating average daily attendance, in computing the number of employees to be dismissed and in complying with notice and hearing requirements.

Q. What process is due teachers in a RIF situation?

A. Much less than is due a teacher charged with personal or professional misconduct or incompetence. Check state law for any specific requirements. Generally, the most that is required to fulfill due process requirements in a RIF is:
- Notice to the teacher (e.g., in letter form).
- Perhaps, a hearing, which can be done as a group for all teachers being laid off. The board's proof is simple: it has to show that it has a lessened enrollment or insufficient funds.

Note: Chester Nolte advises districts to note in board minutes that the teacher or teachers being laid off are competent, and that the layoff is the result of a RIF.

Q. Can a case be made for retaining a nontenured teacher instead of one with tenure?

A. Chester Nolte says yes, provided the RIFfed teacher is guaranteed due process and the district can prove that students will benefit more from retaining a teacher without tenure than one with it. He says some subjectivity is allowable by the U.S. Supreme Court, but the board must be able to show that its actions are not arbitrary or capricious.

The most important question to consider, says Nolte, is not "how well is the teacher teaching," but rather "how well are youngsters learning?"

Nolte suggests using the "Three F's" test, that is, be sure records show that the teachers retained are "firm, friendly and fair" and those let go are loosely organized, loving but losing, and wouldn't recognize "fair" if they met it head on. Elaborating on those points, he says that the kind of *firmness* that makes a teacher worth hiring and retaining means that the teacher is consistent, predictable and "preadvertised," so that no child remains unsure whether what he just did will bring down the switch. *Friendliness* can be determined, Nolte says, by watching for its absence, rather than its presence and by determining whether a child trusts his teacher. "The courts will judge teachers against a standard of what the wise parent would want for his child." On the subject of *fairness*, Nolte says, the teacher must be fundamentally fair: evenhanded, above board, honest, reasonable, just.

He advises against using criteria which sound good but are vague. Rating scales, he advises, are usually found too vague by the courts. The best rating system is "subjective application of objective measures."

Q. What can a superintendent do to ease some of the major problems inherent in a RIF situation?

A. Here's advice from Russell A. Jackson, superintendent of the Roosevelt School District, Phoenix:
- On quelling anxieties: "Everyone must be receptive to meeting with teachers threatened with a RIF, taking calls and running down the anxieties." Jackson himself led information meetings in his district, taking calls from all who called him directly, looking into jobs in other districts for RIFfed teachers, giving a complete report on the number of persons on the recall list at every public meeting of the board of education.
- When to give notices: Jackson advises that notices should be given as early as possible. One or two months before the legal deadline is best, he says. Notice should be delivered by the principal, not sent via mail or just slipped into a teacher's box.

- Reemployment rights for nontenured teachers.
- Ambiguous language, i.e., permitting RIF only when there is a "substantial" or "drastic" decline in enrollment.
- Clauses subjecting the RIF decision, procedures or impact to arbitration.

"This is not to say," the three authors point out, "that a board should not negotiate over any subject matter concerning RIF. Certainly, orderly procedures, including notice and methods for broad review of the application of these procedures, could be negotiated." In any event, they add, "state laws which outline layoff and recall procedures must be followed." Finally, the authors advise boards to distinguish between nonrenewal for cause and layoff for economic reasons when notifying individual teachers of the reasons for their separation.

One other piece of advice comes from several negotiations experts: If negotiating on RIF is inevitable, management should be able to gain some important concessions in exchange for job security clauses.

## What About Affirmative Action?

What role will affirmative action play in hiring/firing decisions? Protection of senior employees against layoffs has traditionally been a central objective of American unionism. And despite rhetoric supporting affirmative action, teachers unions can be expected to stand by last hired/first fired practices, the traditional way of reducing staff. One exception seems to be cases of outright discrimination whereby minority teachers are terminated, for example, when dual school systems are eliminated. Then the union can be expected to support and often pay for legal action to regain lost jobs.

Exactly what effect last hired/first fired procedures have on affirmative action gains is hard to determine. The Education Commission of the States tried to find out, but finally concluded in *Retrenchment in Education: The Outlook for Women and Minorities* that information is scanty, differences in terminology from state to state make comparisons difficult and, in some cases, failure to renew contracts of probationary or nontenured teaching personnel is not labeled a termination or layoff, nor is failure to fill a position vacated by natural attrition. Further, says ECS, most state agencies are not breaking down retrenchment data by sex and race.

ECS concluded from isolated reports that retrenchment (a combination of pinched budgets and declining enrollment) may have a drastic impact on minorities in K-12 teaching positions.

**Note:** The ECS report is available from its Education Finance Center, 1860 Lincoln St., Denver, Colo. 80295.

Another view on the conflict between seniority systems and affirmative action programs comes from the U.S. Commission on Civil Rights. It describes the situation as "a vexing conflict" in *Last Hired, First Fired: Layoffs and Civil Rights*.

The commission reports that a 1975 survey of major collective bargaining agreements found that 90 percent contained layoff provisions. In 85 percent of the agreements, seniority was a factor. More than 42 percent provided for layoffs based on seniority alone, and 30 percent provided for seniority as a determining factor. Most of the agreements analyzed provided for seniority retention periods lasting from 6 months to less than 5 years, with 1 year the most common term.

The report concludes: "The continuing implementation of layoffs by seniority inevitably means the gutting of affirmative action efforts in employment and the scrapping of the guarantees explicit in Title VII of the Civil Rights Act." Rather than relying exclusively on seniority in a layoff, the commission urged the use of alternatives such as permitting the most senior persons "to accept" a temporary layoff instead of the most junior worker and the establishment of separate seniority lists for layoff purposes — one for minorities, one for women and one for nonminority males. Other suggested alternatives offered by civil rights advocates include: reduction of the number of hours worked by all employees, four-day weeks, job sharing and volunteer layoffs.

Some court cases suggest that before layoffs are made, an employer should determine any other costs aside from wages which could be cut.

The U.S. Commission on Civil Rights says affirmative action guidelines "should be based on the principle, explicitly stated, that all seniority based layoff policies should be invalid as they apply to any work force that does not mirror the relevant labor market and the composition of which cannot be explained successfully by the employer."

**Outlook:** The strength of the federal government's enforcement powers is hard to determine. So is the mood of the courts. Because of a lack of last hired/first fired court cases, observers are drawing conclusions from Supreme Court rulings in related cases.

Some observers, for example, note a recent softening or "backtracking" in Supreme Court decisions on job discrimination. In contrast to the early 1970s, they say, both minorities and women will have a harder time proving job discrimination in violation of Title VII of the Civil Rights Act.

In the case of *Hazelwood School District v. U.S.*, the U.S. Justice Dept. said the district, located in St. Louis (Mo.) County, was engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII. The district was accused of not hiring enough black teachers. When the case reached the U.S. Supreme Court, it said the percentage of black teachers to be employed by the district should be based on the percentage of black teachers (not students) in the "relevant labor market area"; that the trial court should determine that area; and that consideration had to be given to the district's hiring practices after, not prior to, the time it became subject to Title VII.

In making that ruling, the Supreme Court referred to its May 1977 opinion in the case of the *International Brotherhood of Teamsters v. U.S.* The court ruled that seniority systems established prior to the 1964 Civil Rights Act may be legal even if they have the effect of perpetuating sexual and racial discrimination. That decision was interpreted by one Supreme Court watcher as indicative of the court's reluctance to further expand the Constitutional and legal rights of minorities. The observer said the decision casts doubt on the validity of changes in seniority systems that were made on the assumption that they were legally required. The decision also raises doubts about the willingness of the justices to void seniority rules, the observer noted.

A third case, viewed as indicating a change in the Supreme Court's attitude toward job discrimination, was decided in January 1978. A federal court in South Carolina upheld the use of the National Teachers' Examination to certify teachers for jobs and determine their pay levels. A far higher percentage of black applicants than white failed the test, and its use was challenged by the Justice Dept. and the NEA. The Supreme Court, without hearing oral arguments or offering an explanation, affirmed the decision of the lower court. School boards' authority to use the test was upheld despite its outcome: a disproportionate number of black applicants were screened out.

## Don't Neglect PR

"Velvet gloves should be standard attire in school board members' (and superintendents') mental wardrobe as they deal with the public in these delicate days of declining enrollment," advised one superintendent.

The PR aspects of declining enrollment cover many topics: students, teachers, parents, buildings, dollars and community programs.

Advice on how to deal with many of these topics comes from the National School Boards Association in its report, *Declining Enrollment: Its Challenge for Urban School Boards*. It suggests 10 imperatives:

1. Take a positive stance in dealing with the enrollment situation; accept the irreversible trends; come to grips with facts.
2. Be on top of the issue. Take it to the community, instead of the other way around.
3. Don't let the community assume that declining enrollment presents an opportunity to save money.

### *Teachers get help in planning new careers*

## Case Study: St. Louis Park, Minn.

Helping teachers cope with layoffs is a particular concern of the St. Louis (Minn.) Public Schools. "I think you need to do something to psychologically help teachers handle the trauma," said Supt. Michael E. Hickey. "It is terribly depressing."

St. Louis Park, a first-ring suburb of Minneapolis, has been declining in enrollment about 5 to 6 percent a year since the 1960s. Now 70 percent of the homes have no children. Between 1973 and 1977, the district cut $3.5 million in its $12 million budget, causing the RIF of 103 teachers. In 1976, late-spring attrition allowed the district to hire back all laid-off teachers, but in 1977 only a third of them could be brought back.

In 1977, the district cut into tenured teachers hired in 1968 and 1969. One teacher with 11 years' experience was RIFfed. Another with seven years' experience received RIF notices four years in a row. "Some are just hanging on by a thread each year," said Hickey.

The district helps teachers look seriously at other careers. In 1977, for example, it held a two-session Alternative Career Planning Seminar that attracted 80 of the district's 465 teachers. The sessions were held on succeeding evenings at a junior high school. On the first evening, three experts (from a university women's center, a career development agency and a vocational center) outlined the dynamics of changing careers, then answered questions. The second session involved discussions by panelists from local private-sector firms: insurance, real estate, word processing, clerical, data processing and a large industrial firm. They talked about opportunities in their fields.

The seminar cost the district about $500, not including the time donated by the district's personnel director, guest panelists and officials of two local teachers organizations. The district plans to continue the seminar in the future.

St. Louis Park also is using these methods to soften the impact of layoffs:

- One-year leaves to let staff members look into alternative careers.
- A job-sharing program.
- An early retirement incentive program in which the state pays 10% of the district's costs.
- Mailing lists of RIFfed teachers to other districts in the state.

These steps not only assist teachers being laid off, but they get people still two or three years away from layoff thinking about where their careers are headed, Hickey pointed out. Ex-St. Louis Park teachers now hold such jobs as a real estate salesman, north woods guide and proprietor of a family business.

For more information, contact Michael E. Hickey, Superintendent, St. Louis Park Schools, 6425 W. 33rd St., St. Louis Park, Minn. 55426.

4. Share declining enrollment figures with the public.
5. Make the business community see the public education system as crucial to the economic health of an area.
6. Establish an ''educative'' relationship with the press.
7. Examine carefully how much responsibility the school board bears for loss of children from the public schools, e.g., have standards been allowed to slip?
8. Explore sources of new money.
9. Carry out a major reexamination of the district budget.
10. Determine and bring up to date each policy area related to declining enrollment. (NSBA lists 23 areas, ranging from fiscal management goals to staff assignment and transfer, teacher tenure and public information programs.)

The NSBA report, prepared by its Council of Big City Boards of Education, includes five specific strategies to be used in explaining decline:

- Emphasize per-pupil costs and inflation's effect on them, rather than overall budget costs.
- Break out per-pupil costs and number of pupils by category, e.g., dramatize the rising number and high cost for special education.
- Compare the status of school costs with those of local city or county government, e.g, has the cost of the fire department, police or other services gone down as the number of residents decreases?
- Publicize net savings when they occur.
- Show the public how money saved by reducing staff or closing schools will be used.

## What To Expect from the Union

What kinds of tactics will a teachers union suggest to its local associations to counter a RIF?

Here are some of the suggestions passed on to locals by the Illinois Education Association:

- ''Study the past attitudes of school officials concerning passage of school tax measures. Chronicle past board actions regarding RIF. Check board minutes and newspaper accounts for motions and statements that can serve as evidence of preconceived ideas and trumped up activities. In other words, get the 'goods' on the board.''
- Be able to prove that the district has funds available, has not planned for emergencies, has a record of seeking too little in funding and of falling behind financially over the years, continues to be unwilling to seek passage of school bond and tax referenda and is missing the boat on federal funding of special programs.
- Devise, present and publicize a set of alternatives which will involve cooperation among teachers, parents and the general public.
- ''Show RIF as a ploy by school officials to sandbag negotiations, to terrorize teachers, to avoid a referendum, to close school buildings or to accumulate more funds in school district coffers.''
- Gather all relevant statistics, including the district's financial trends, increases in cost of living, other recent union settlements.
- ''Check administrative and nonteaching personnel cuts to compare with RIFfed teacher totals. . . Keep tabs on administrative salaries.''
- Check with the negotiations team to determine whether the RIFs constitute a violation of the board-association contract. ''If a violation is discovered, press into action the grievance machinery.''
- Use research data to develop a hard-hitting campaign to generate attention, understanding and public support to retain education at the current level.
- ''Consider an in-depth approach such as a special packet for the legislature and for the news media.''

Do local associations follow the advice of the state leaders? One did, adding some tactics of its own to save the jobs of 26 RIFfed teachers. Among its tactics: distribution of badges and bumper stickers, distribution of anti-RIF flyers to parents, businesses, banks and contractors, encouragement of anti-RIF letters to the editors of local newspapers, setting up a RIFline telephone and awarding a ''fickle finger of fate'' to officials of the school district.